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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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1920

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1936

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1937

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1938

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1948

Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 1 (1) (2) - - **C.A. 171**

—— —— *s.* 8 - - - **C.A. 1**

Children Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *ss.* 1, 13 - - - **Divl.Ct. 385**

Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 48 (3) (4), 49 (1). **C.A. 357**

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Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 8. **C.A. 267**

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STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Children and Young Persons (Boarding-out) Rules, 1946 (*S.R. & O.* 1946, *No.* 2083), *rr.* 4, 8 (1), *Sch.* **Divl.Ct. 385**

Hire-Purchase and Credit Sale Agreements (Control) Order, 1952 (*S.I.* 1952, *No.* 121), *art.* 1, *Sch.* 2 - **Jones J. 35**

Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *arts.* 1 *and* 2 - **C.A. 46**

Lands Tribunal Rules, 1949 (*S.I.* 1949, *No.* 2263), *rr.* 9, 38 (4) - - **C.A. 357**

Motor Vehicles (Construction and Use) Regulations, 1951 (*S.I.* 1951, *No.* 2101), *regs.* 72 (1), 101 - - - **Divl.Ct. 113**

National Health Service (Superannuation) Regulations, 1950 (*S.I.* 1950, *No.* 497), *reg.* 60 - - **Cassels J. 221**

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—— *Ord.* 28, *r.* 11 - - **Havers J. 308**

ERRATUM

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

SCLATER *v.* HORTON.

C. A.

1954
Jan. 19, 20;
March 1, 2.

Evershed M.R., Denning and Romer L.JJ.

[Plaint No. J. 216.]

Agriculture—Agricultural holding—Rent payable—Reference to arbitration—Service of statutory notice—Whether reference to be before "next ensuing day" on which tenancy determinable—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 8.

Statute—Construction—Argument ab inconvenienti—Words of futurity —"Should be" not "should have been."

On September 26, 1949, the landlord of an agricultural holding let on a yearly tenancy commencing on September 29, served on the tenant a notice pursuant to section 8 (1) of the Agricultural Holdings Act, 1948, to refer to arbitration the rent payable as from September 29, 1950. No reference was made, however, until three years later, when on September 26, 1952, the landlord served another notice under the section, demanding that the rent payable from September 29, 1953, should be referred to arbitration. He then applied to the Ministry of Agriculture and Fisheries to appoint an arbitrator, and on October 24, 1952, the Minister appointed an arbitrator. The question then arose whether the arbitrator was entitled to determine the rent as from September 29, 1950, or only from September 29, 1953:—

Held, that the arbitrator was not entitled to consider the rent for the earlier period to which the notice of September 26, 1949, had related, but should determine the rent payable as from September 29, 1953, by reference to the facts as at October 24, 1952, the date of the reference.

Appeal from Judge Archer sitting at Lewes County Court.

The following statement of facts is taken from the judgment of Evershed M.R.: On June 30, 1938, the landlord, Gilbert Edward Sclater, let to the defendant, George Merrett Horton, an agricultural holding known as Double Barns Farm in the parish of Newick, Sussex, from September 29, 1938, until September 29, 1939, and thereafter from year to year at the yearly rent of £150 together with certain interest payments.

On September 26, 1949, the landlord's agents served a notice on the tenant expressed to be by reference to section 8 of the Agricultural Holdings Act, 1948, in the following terms: "As "agents for and on behalf of the landlords we hereby give you "notice in accordance with section 8 (1) of the Agricultural "Holdings Act, 1948,[1] that it is desired to refer to arbitration "under the said Act the question of what rent should be payable "in respect of the holding of which you are tenant as from "the next ensuing day on which the tenancy could have been

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[1] Agricultural Holdings Act, 1948, s. 8: "(1) Subject to the provisions "of this section, the landlord or the "tenant of an agricultural holding "may, whether the tenancy was "created before or after the commencement of this Act, by notice in "writing served on his tenant or "landlord demand a reference to "arbitration under this Act of the "question what rent should be payable in respect of the holding as "from the next ensuing day on which "the tenancy could have been determined by notice to quit given at "the date of demanding the reference, "and on a reference under this subsection the arbitrator shall determine what rent should be properly "payable in respect of the holding at "the date of the reference and accordingly shall, as from the day aforesaid, increase or reduce the rent "previously payable or direct that it "continue unchanged."

Subs. (3): "A reference to arbitration under subsection (1) of this "section shall not be demanded in "such circumstances that any increase "or reduction of rent made in consequence thereof would take effect "as from a date earlier than the "expiration of three years from any "of the following dates, that is to "say . . . (b) the date as from which "there took effect a previous increase "or reduction of rent . . ."

S. 71: "Subject to the provisions "of this Act, where a sum agreed or "awarded under this Act to be paid for "compensation, costs or otherwise by "a landlord or tenant of an agricultural holding is not paid within "fourteen days after the time when "the payment becomes due, it shall "be recoverable upon order made by "the county court as money ordered "by a county court under its ordinary "jurisdiction to be paid is recoverable."

Sch. 6, para. 13: "The arbitrator "shall make and sign his award "within 42 days of his appointment. "Provided that the Minister may "from time to time enlarge the time "limited for making the award, "whether that time has expired or "not."

"determined by notice to quit if such notice had been given "today." It was not in dispute that "the next ensuing day" referred to was September 29, 1950.

There followed a period in which such approaches or communications as the tenant made to the landlord for the most part remained unacknowledged and unanswered, except that in August, 1950, the two parties agreed that, if they should fail to reach agreement as to the rent, and if as a consequence an arbitrator was ultimately appointed, his award should operate from Michaelmas, 1950. The agreement was not produced to the court, and no evidence was adduced as to its precise terms; nor was any question of its construction or enforceability before the court.

On September 26, 1952, the landlord served a notice headed "Agricultural Holdings Act, 1948" which read: "Please take "notice that we hereby demand a reference to arbitration under "the said Act of the question what rent shall be payable in "respect of the said holding as from the next ensuing day on "which the tenancy thereof could be determined by notice to "quit given at the date of this demand." "The next ensuing "day" there referred to was September 29, 1953. On the same day, the landlord communicated with the Minister of Agriculture and Fisheries, and set in motion the machinery which is provided by the Agricultural Holdings Act, 1948, s. 8 and Sch. 6, and by the rules made pursuant to section 77 of the Act. As a consequence, on October 24, 1952, the Minister, acting by his duly authorized agent, appointed Mr. Allam, of Horsham, to be the arbitrator, "for the purpose of settling "the claims, questions or differences between the landlord and "the tenant of the holding mentioned in the first schedule hereto "which are specified in the second schedule hereto." The second schedule provided: "The rent to be paid for the said "holding as from the next ensuing date at which the tenancy "could have been terminated by notice to quit given by Mr. "G. E. Sclater, the landlord of the said holding, at the date "of the demand for arbitration made by him to the said tenant."

At the hearing before the arbitrator it was submitted on behalf of the landlord that the arbitrator was empowered and bound to arbitrate the rent payable for the three years commencing September 29, 1950, whereas the tenant submitted that the arbitrator was competent only in relation to the second triennial period, that was, from September 29, 1953. The arbitrator thereupon stated a special case for the opinion of the county court, and

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Judge Archer decided that the arbitrator was not entitled to deal with the rent payable as from September 29, 1950, but that he was entitled and should proceed to deal with the rent for the second triennium. The landlord appealed.

Cecil Binney for the landlord. The notice served by the landlord in 1949 is still effective; and the arbitration is not out of time in relation to that notice, for the Act does not specify that an arbitration must be brought within a specified time after the service of the notice demanding a reference. The arbitrator should, therefore, proceed to fix the rent as at the date of the reference (that is, October 24, 1952) to be payable as from September 29, 1950 (that is the day next following the service of the notice demanding a reference on which the tenancy could have been determined by service of a notice to quit). It is said that delay in bringing the matter to arbitration may involve hardship on a tenant, but it is open to the tenant to bring matters to a head at any time by himself demanding a reference to arbitration, and if the arbitrator does not act expeditiously either landlord or tenant can apply to appoint a new arbitrator if he considers that the delay is causing hardship to him. In the present case the tenant was just as inactive as the landlord, and it is arguable that on the facts the parties agreed to extend the time during which the arbitration could be held. The date on which the rent as fixed by the arbitrator becomes payable will rarely be the date of the reference; it will have to be either antedated or post-dated according to whether the date of the reference is before or after the date on which the tenancy is determinable, and just as great a hardship might be involved one way or the other if rents have fluctuated during the material period.

It is not clear whether the tenant contends that the date of the hearing or the date on which the arbitrator is appointed must be before the material date, but it seems probable that the "date of reference" means the date when the arbitrator actually hears the case.

The Agricultural Holdings Act, 1948, deprives the landlord of many of his common law rights and, therefore, as was said in *Turton* v. *Turnbull*,[2] if there is any ambiguity it ought to be resolved in favour of the landlord. *Lowenthal* v. *Vanhoute*[3] is closer to this case than *Hughes* v. *Metropolitan Railway Co.*[4]

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[2] [1934] 2 K.B. 197.

[3] [1947] K.B. 342; 63 T.L.R. 54; [1947] 1 All E.R. 116.

[4] (1877) 2 App.Cas. 439.

The second notice was distinct and separate from the first and did not in any way effect a waiver of the first. Nor could the tenant have supposed that it did. The appointment did not refer to the second notice, and it is submitted that the arbitrator was validly appointed to determine any points under the Act which he had jurisdiction to determine, and that it was within that jurisdiction to determine the rent payable as from September 29, 1950.

C. J. S. French for the tenant. The Agricultural Holdings Act, 1948, does not in terms require that the arbitration should be held within a limited time after the service of the notice referring the rent to arbitration, but it is the necessary construction of section 8 that that was intended. The provision that the rent is to be fixed by reference to the facts as existing at the date of the reference shows that the draftsman contemplated proximity between the date of the reference and the date on which the new rent was to take effect. The date of the reference is not the date of the actual hearing but the date when the arbitrator is appointed, either by agreement between the parties or by the Minister. If the landlord's submission were correct it would mean that the landlord could serve a notice, and then wait until rental values were inflated, so that a high rent would be fixed and become payable as from the date of the notice, by then possibly a date long past. The landlord has said that it is open to the tenant to bring matters to a head, but it is the landlord who is seeking relief; the tenant may be content with the contractual rent, and it would be unreasonable to expect him to insist on an arbitration or to be faced with the peril of having his rent increased retrospectively at some date in the future. On the facts here it seems that the tenant did all that could be reasonably expected of him to bring matters to a head.

The landlord should not have to accept a lower rent or the tenant have to pay a higher rent without having had opportunity to terminate the contract. If the rent can be altered retrospectively it will mean that a tenant may be faced with an obligation which he might not have undertaken but would instead have served a notice to terminate the contract. The remedy of serving a notice to quit is not so attractive to the landlord as it was before the Act came into force, but it is still possible for him to serve an effective notice to quit in certain circumstances (see section 24), and if the rent as fixed by the arbitrator was below a certain figure he might as at the date on which that rent became payable have wished to avail himself of those provisions.

Section 8 is intended to provide a remedy for either the landlord or the tenant if there is a divergence between the rental value of the holding and the actual rent paid owing to a change in the value of land. The legislature has provided that either party should be able to apply to have the rent varied, but the section clearly contemplates that the remedy of reviewing the rent should be concurrent with the circumstances which give rise to the need for review. As the landlord is seeking relief in the present case the onus is on him to show that there is proximity between the date of valuation (that is, the date of reference) and the date on which that valuation is to take effect. It is submitted that the Act clearly contemplates that the reference should precede the date on which the new rent becomes payable.

[DENNING L.J. The wording of the section seems to contemplate a future date: it provides what rent "should be "payable" as from the next ensuing date on which the tenancy would have been terminable. The section seems to show that the parties must at least start the reference before that date.]

The award must be within 42 days after the reference: see paragraph 13 of the Sixth Schedule.[5] Any delay after the date of reference would be the law's delay which is not attributed to the parties.

[DENNING L.J. If the rent was reduced, there does not seem to be any means whereby the tenant could recover what in the event has turned out to be an overpayment of rent.]

That sort of difficulty is unavoidable if the landlord's submission is accepted as correct. It would also be extremely difficult for the tenant if the rent could be increased retrospectively long after his accounts had been closed. It is clear that, from a practical point of view, the rent should be fixed at or about the date when it becomes payable, and it is significant that the Act makes no provision for overcoming the difficulties which would otherwise arise.

Section 8 gives the right to have the rent reviewed once every three years, but if the reference can be delayed long after the expiry of the notice, the tenant may lose his right to have the rent reviewed regularly. For example, if a notice is served in September, 1949, and the reference is not held until after September, 1952, if the landlord's contention is correct the arbitrator could change the rent retrospectively as from September, 1950, but the tenant could not serve a notice to have a reference to change the rent as from September, 1953, that is three years after the previous change, because he would not know what the rent was in time to serve his notice in September, 1952.

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[5] See note on p. 2.

On the facts of this case the second notice is only explicable on the basis that the parties considered the first to be invalid, for otherwise it was nugatory.

Cecil Binney in reply. The section does not specify any limit of time nor does it contain any clear indication of futurity. " Should " means " ought " in this context, and is not used as a word of futurity. It is conceded that the date of the reference cannot be extended indefinitely; the arbitration probably should be within three years after the service of the notice. It is also conceded that the landlord may not be able to enforce an award as regards instalments of rent which have fallen due before the rent was changed; but the rent can be altered retrospectively, and any instalments falling due or unpaid at the date of the award will be on the new basis. Section 71 meets the alleged difficulties which might arise if the arbitrator reduced the rent. There is no great hardship on the tenant if there is some delay, for the service of the notice warns him that some change in the contractual rent is likely. While it is true that he would not know the exact figure, he would be aware of the changing values, and in practice he would have a fair idea of what rent would be likely to be fixed. There are no clear words limiting the period in the Act, and an argument ab inconvenienti is not a sufficient ground for reading words into this Act, especially as it is one which deprives the landlord of many of his contractual rights.

B. S. Wingate-Saul for the Ministry of Agriculture and Fisheries as amicus curiae. Section 8 of the Act of 1948 does not in terms prescribe any limit on the time during which an arbitration must be held, and the Minister has no power to prescribe a limit. He can expedite arbitration proceedings, but he cannot require that an arbitration should be held within a particular period. [Reference was made to the prescribed forms for making an application for a reference to arbitration in Sch. 2 of the Agricultural Holdings (England and Wales) Rules, 1948 (S.I. 1948, No. 1943).] In this case the landlord's application to the Minister to appoint an arbitrator referred only to the notice of September, 1949; he did not mention that he had served a second notice, though the Minister was informed of the service of the second notice before the arbitrator was appointed. The Minister takes the view that his functions are merely administrative and that it is not for him to adjudicate the date on which the rent as fixed by the arbitrator should become payable. If a prima facie case is made out for the appointment of an arbitrator, the Minister appoints one and questions such as this are left open for the parties to raise. There are several provisions in the Act which require the Minister to impose time restrictions, but section 8 is not one of them, and the Minister ought not to lay down any requirements as to the time within which the reference must be brought.

The difficulties which are involved in the adjustment of the rent may arise even if the reference is heard within the currency of the notional notice to quit, particularly as the award may be signed up to 42 days afterwards and the Minister has power to extend that period. Even if the section had stipulated that the award must be published within the currency of the notional notice to quit, there still would be difficulties in cases where the rent was payable in advance.

EVERSHED M.R. The facts of this case render it, as I hope and believe, somewhat unusual. The problem arises under section 8 of the Agricultural Holdings Act, 1948, which is one of the many sections which contemplate that the Minister of Agriculture and Fisheries may in certain circumstances appoint an arbitrator; and in the present case the Minister did make such an appointment. Since the problem which has been presented to the court involved a consideration of the meaning of section 8, and, as a consequence, of the scope of the jurisdiction of an arbitrator appointed by the Minister under that section, the case was adjourned after a first hearing on January 20, and it was intimated to the Minister that, if he thought fit to be represented at a further hearing by counsel as amicus curiae, the court would be grateful for any assistance which he might give. Mr. Wingate-Saul has appeared on the Minister's behalf, and I acknowledge my indebtedness to him and to the Minister for the assistance which has been given. I hope that this judgment will assist rather than embarrass the future operations of the Minister in the performance of this one of his many duties under the Act.

[His Lordship stated the facts, substantially as set out above, and continued:] On October 24, 1952, there had been, beyond a peradventure, two demands by the landlord to the tenant, if the document dated September 26, 1949, on which the landlord mainly relies, was a demand and was still subsisting. It is not in doubt that section 8 (1) contemplates only one demand having been made, in reference to which the appointed arbitrator is to exercise his functions; and it is for this reason that I credit the landlord with a certain ingenuity. Mr. Binney has pointed out that the notice to the Minister bore the same date as the second demand to the tenant, namely, September 26, 1952, and that, when the landlord approached the Minister, the demand alleged by him was the old document of September 26, 1949. It has been the landlord's point that the arbitrator should now determine the rent payable by the tenant from the date long past of September 29, 1950, and that the arbitrator is not now, or was not then, concerned with the rent payable from September 29, 1953.

This manoeuvre by the landlord, though it may have been ingenious, was in a sense partly futile, because assuming that the tenant took up the challenge as regards the second demand or notice which he received, the arbitrator would then have had to determine the two questions raised by reference to the same or to substantially the same date, so that he could not, presumably, have awarded rent for the second triennium which differed at all from that awarded for the first triennium. That, however, is by the way.

As the case has come to this court, it is not open to either side to suggest that if Mr. Binney is wrong on his main point —that is, that the arbitrator is entitled to award the rent for the first triennium—the arbitrator is entitled under this nomination to deal with the rent for the second triennium. But the argument was presented to the arbitrator that he was empowered and bound to deal with the rent for the first triennium, and on that matter a special case was stated by him for the opinion of the county court. The county court judge determined, in answer to the question posed, that the arbitrator was not entitled now to deal with the rent for the first triennium, but that he was entitled and should proceed to deal with the rent for the second. From that decision the landlord has appealed to this court, and I will say at once that, in my judgment, the county court judge was correct in the conclusion at which he arrived.

In order to answer the problem presented to the court, it is necessary to construe section 8. Three dates are mentioned in subsection (1), as regards each of which it is important to come to a clear conclusion. The first date is the date of the demand of a reference to arbitration. The second date is the next ensuing

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day on which the tenancy could have been determined by notice given at the date of the demand. The third is the date of reference. In stating the dates in that order I am not indicating their chronology, but stating the order in which the dates appear in the subsection.

It is not in doubt that, applying the language of section 8 to the facts of the present case, the demand which is set up is the demand contained in the first notice, that of September 26, 1949; and I will assume (though I do not so decide) that that document, in which the landlord expressed a wish that the matter should go to arbitration, was a demand within section 8. If that is the "demand," then the second date, in the order in which I have mentioned it, becomes clear: it is the next ensuing day on which the tenancy could have been determined by notice given on September 26, 1949, and that date is September 29, 1950. The third date is the date of the reference.

The next question is what is meant by the words "the "reference"; and both Mr. Binney and Mr. French have conceded that by "the reference," the section should be taken to mean the date on which the appointment of an arbitrator becomes effective—an arbitrator, who might, be it observed, be an arbitrator appointed by the Minister. It will, therefore, be seen that, since the arbitrator was appointed (and was effectively appointed, for he accepted the appointment) in October, 1952, the date of the reference is substantially later than both the date of the relevant demand and the second date, "the next ensuing day "on which the tenancy" at the date of the demand "could "have been determined." As I will show in a moment, if Mr. Binney's submission is right, that circumstance gives rise, or may give rise, to somewhat remarkable results. Mr. Binney says with justice, however, that there is no express language in section 8 which indicates that the third date, that is the date of the reference, should bear any particular relation to the second date, which I will call the termination date (in this case, September 29, 1950) unless subsection (3) has the effect of requiring that the reference must be within three years after the termination date. Mr. Binney says, therefore, that, in the absence of express language, the court cannot hold that there is any specific limit of time applicable. I do not agree with that argument. As I construe this subsection, though it is true that it makes no express reference to time (as is made in other sections), yet I think that the necessary and inevitable implication of the language which Parliament has used is that the termination date, that is the date which is here called "the "next ensuing day," must be after the date of the reference.

If Mr. Binney's contention is well founded the arbitrator is required to fix the rent as operative from September 29, 1950, but by reference to the facts as they were at the date of the reference, that is in October, 1952. As Mr. Binney has pointed out, during the whole period covered by this case it is notorious that rents have been rising. Therefore, if his argument is right, the rent will be fixed by reference to a date when circumstances will have been quite different from the circumstances as they were when, under the enacted result of the section, the new rent is to be treated as having taken effect. Mr. Binney contends that this is not an extravagant or unfair result, but that since the rent is fixed for a three year period, any one date within the three years is as fair, or unfair, as any other. I cannot accept that. If a rent is to be fixed, the normal and fair date at which it should be fixed is the date when it begins to operate. I should have thought it plain that the section is contemplating that the rent is fixed by reference to a fair commencing date. Parliament has said that that rent is to remain stable for three years at least, and at the end of the three years the matter can be reviewed and a new rent can be fixed, if a new rent is then regarded as fairer than the old.

Further, if Mr. Binney is right, what happens when the award is made and the rent is altered ex post facto for a period of up to three years?—and it may be more than three years if the three year limit under subsection (3) does not apply. What is to happen if the arbitrator, ex post facto to the extent of three years, alters the contractual rent? I assume that the landlord, according to his submission, would then be able to sue for unpaid rent for the last three years. I am not entirely satisfied what the cause of action would be. If rent was paid in accordance with the contract, the tenant would be entitled to have had a discharge under the contract. More difficult still would be the situation if the decision went the other way, and the arbitrator reduced the rent: the question would then be by what means the tenant would be able to recover what had turned out to be an over-payment. Again, I am not at all clear what the cause of action would be. With all respect to Mr. Binney, I am satisfied that section 71 of the Act does not provide the answer. If Parliament had intended (as in other legislation it does sometimes provide) that one party or another to a contract should be entitled to recover something, notwithstanding the contractual obligation, or notwithstanding what in fact had been paid, it would have been so stated in clear terms. And Mr. French has also observed that if three years after the contractual rent has been paid, and on which all the tenant's accounts have been based, that rent is suddenly altered, another question arises: what would be the effect as regards the tenant's returns for income tax?

Finally, Mr. French has observed that if a landlord, having made a request, can delay the effective award for three years, or perhaps longer, the tenant is effectually prevented from exercising the corresponding right to demand a reference to arbitration under subsection (3) (*b*); for he cannot require a review to take effect earlier than the expiration of three years from the date on which there took effect a previous increase or reduction; and, plainly, an increase or reduction cannot be said to have taken effect until the award in respect of it has been pronounced.

These are arguments mainly, perhaps, ab inconvenienti, but I think that they are not insignificant arguments. They are not, however, the whole matter. I think that Mr. French is entitled to point to the use of the tenses in subsection (1) itself. The first point made by Mr. French is that the question which may be referred to arbitration is the question, "what rent *should be* "properly payable as from the next ensuing day" and so forth. Prima facie those are words of futurity. Instances could, no doubt, be given in which in a statute or in other contexts the future "should be" covers also the future perfect "should "have been." But in this case it is to be noted that in the very next line the future perfect is stated: "should be properly "payable in respect of the holding as from the next ensuing day "on which the tenancy could have been determined." Parliament was, therefore, using these tenses, I should have thought, with care, and, if Mr. Binney is right, I should have expected the formula to have been "what rent should be or have been "payable." A similar point occurs a few lines further on: "and on a reference under this subsection the arbitrator shall "determine what rent *should be* properly payable in respect of "the holding."

Finally (and this may be the strongest instance) the subsection reads: "and accordingly shall, as from the day aforesaid, "increase or reduce the rent previously payable or direct that "it *continue* unchanged"—not "that it continue or be deemed "to have continued," which strictly should have been said, if Mr. Binney's argument is right.

I think that the result of adding to the arguments which I have called the arguments ab inconvenienti these implications from the tenses used is to produce a clear conclusion, that in this subsection Parliament intended that the second date mentioned, the termination date, should follow the reference. More than that for present purposes I need not specify; and if I tried to elaborate it I might only embarrass those whose duty it is to carry the Act into effect. It is sufficient for me to say, as I do say, that I think that the necessary implication of the language used is that the termination date, the date which is called "the "next ensuing day on which the tenancy could have been "determined" must follow the reference. In the result, in my opinion, the "demand" of September, 1949, has for present purposes, ceased to be of any effect. For those reasons I think that Judge Archer in the county court correctly answered the questions submitted to him by the arbitrator, and, accordingly, that this appeal should be dismissed. I add only this: I have already said that, whatever argument might have been presented, it is clearly not open to either party to argue in this court that the appointment of Mr. Allam in the circumstances is not, and was not, effective to determine what rent should be payable in respect of this holding as from September 29, 1953, and that he should make that determination by reference to the facts as he finds them on the date of the reference, which for this purpose seems to me to be October 24, 1952.

DENNING L.J. Before the war a landlord could get an agricultural tenant out of his farm by one year's notice to quit. Now he cannot get him out without the Minister's consent. The eviction of a farmer is prohibited, but the increase of rent is not. A landlord can increase the rent to a proper rent, but he has to give one year's notice beforehand. The year's notice must be given for the same day as in former times he would have given the tenant notice to quit. The parties must then, within the year, either agree upon the increased rent, or refer it to arbitration.

On the true construction of the statute I am in full agreement with the Master of the Rolls that the reference must take place within that year, by which I mean that the arbitrator must be appointed and must accept his appointment within that time. If the arbitrator is not appointed within the year, then the landlord loses his right to increase the rent; but if the arbitrator is appointed within the year, then the arbitrator has to fix the new rent. He must fix it as at the date of the reference, and that means, I think, as at the date of his appointment. He must make his award within, at latest, six weeks of his appointment, unless the Minister enlarges the time. This means that he will, in practice, fix the new rent before the new year begins, so that the parties will know where they stand before the first payment of the new rent falls due, or at any rate he will fix it within a few weeks after the new year starts. The rent having been fixed in that way, it is fixed for the next three years. If either side at the end of the three years wishes to alter the rent, he must give the appropriate one year's notice beforehand.

Unless the statute is given the interpretation which I have stated, great difficulties which the Master of the Rolls has pointed out would ensue. The difficulty which strikes me most arises in the case of a reduction of rent. If it were open to an arbitrator to reduce the rent two or three years after it accrued due, it would mean that the tenant would have paid the rent, and he could not recover the excess because there is no provision in the Act for the repayment of any excess. That is just one difficulty amongst many which has led me to the conclusion that Parliament must be treated as contemplating that the reference should be made within the year. Accordingly, I agree that the appeal should be dismissed.

ROMER L.J. I also agree. Both the landlord and the tenant are in agreement that the words " the date of the reference " in section 8 (1) of the Act mean the date of the effective appointment of the arbitrator, either by agreement or, in default of agreement, by the Minister, and I think that they are right in that view. But where their views diverge is that the landlord says that the date of the appointment may be at any time during the three years period with which, in effect, the section is dealing, whilst the tenant says that it must be before " the next ensuing " day on which the tenancy could have been determined by notice " to quit given at the date of demanding the reference." Whichever it is, the date of the reference is perhaps the most vital date for the purposes of the section, because it is according to the values which prevail on that date that the rent for the next period is to be assessed and fixed. I should have thought, offhand, that that date would be prior to the time from which it was to operate, and not afterwards, partly because that is the ordinary conception to which people subscribe in fixing the rent of tenancies for a term of years, and partly because once the view is taken that the date of the reference (and, therefore, the date of fixing the rent) may be after the three years period has started, it follows, I suppose, that it might be at any time during that period, or even possibly after the three years period has expired. Mr. Binney, on behalf of the appellant, says that that would lead to a very fair result, and that it may well have been in the contemplation of the legislature because the arbitrator, if he were appointed late during the three years period, would be better equipped to fix the rent for that period as a whole than if he started off at the beginning; and Mr. Binney argues that anyhow there is no ideal way, when rents are constantly fluctuating, of fixing a fair rent for the whole period.

I do not agree with that. Where, as in the present case, rents were rising, it would obviously be greatly to the advantage of the landlord to have the date of the reference fixed as late as possible during the three years period, so that he could get an entirely artificial rent fixed which would operate from the beginning of the period. If, on the other hand, the date of the reference (and, therefore, the date of fixing the rent) was at or just before the beginning of the new period, the parties would at least start off with a rent which, presumably, was a fair and proper rent at that time. That seems to me to be the contemplation of the legislature. This view is fortified when one considers the difficulties, to which the Master of the Rolls referred, which would result from the acceptance of the landlord's argument, and also I think by the language of the subsection itself to which the Master of the Rolls has drawn attention.

Accordingly, I think that, as a matter of necessary implication from the wording of the subsection, the date of the reference must be within the year after the demand in writing has been served, and, therefore, cannot be held to be at some later date after the period started. I agree, therefore, that this appeal fails.

Appeal dismissed.

Solicitors: *Adams, for Nye & Donne, Brighton; Solicitor, Ministry of Agriculture and Fisheries.*

E. D.

C. C. A.

1954
Mar. 15.

Lord Goddard C.J., Slade and Gerrard JJ.

REGINA *v.* REITER AND OTHERS.

Criminal Law — Evidence — Obscenity — Publication of obscene libels— Character to be ascertained from examination of books themselves— Evidence of comparison with other books in circulation not relevant. Obscenity — Obscene libel — Test — Whether modern standards relevant.

In prosecutions for the sale of indecent literature or for publishing obscene libels the character of the books which are the subject of the prosecution is to be ascertained by examination of the books themselves, as they provide the best evidence of their own indecency or obscenity or of the absence of such qualities. Evidence designed to show that other books not materially different in character from those alleged to be indecent or obscene are in circulation should not be considered since the character of such books is a collateral issue and therefore irrelevant.

Observations of the Lord Justice-General (Cooper) in *Galletly* v. *Laird,* 1953 S.C.(J.) 16 adopted and applied.

Appeals against conviction and sentence.

The appellants, Julius Reiter and Reginald Herbert Carter, and the appellant companies, Gaywood Press Ld., New Fiction Press Ld. and Arc Press Ld., were charged at the Central Criminal Court upon an indictment containing seven counts of uttering and publishing obscene libels in the form of seven books.

On the first day of the hearing the jury read the books. The appellants contended that the books were not obscene by the standards of today, and during the course of the case the defence produced a number of other books which the jury were asked to examine to decide whether the seven books alleged to be obscene libels were obscene or not. The appellants were convicted on all seven counts. The men were sentenced each to six months' imprisonment; each company was fined £2,000.

They appealed against conviction on the ground, inter alia, that the recorder had misdirected the jury by telling them in his summing up that it would be wrong in law for them, in applying the standard of obscenity laid down in *Reg.* v. *Hicklin* [1] to the books alleged to be obscene libels, to take into consideration the standard or kind of literature published and sold at the present time. They also appealed against sentence.

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

[1] (1868) L.R. 3 Q.B. 360.

Gerald Howard Q.C. and *Christmas Humphreys* for Carter, New Fiction Press Ld. and Arc Press Ld. The defence did not dispute that the proper test of obscenity for the jury to apply was that laid down by Cockburn C.J. in *Reg.* v. *Hicklin*,[2] but it was contended that standards vary from age to age and that in applying that test the jury were entitled to take into account the standard of literature on sale to the public today. The recorder clearly expressed his disagreement with that view, and in his summing up he directed the jury that present day standards were not to be taken into account. By so doing, he withdrew the main contention for the defence from the jury and debarred them from considering it. No objection could have been taken by the defence if the recorder had directed the jury to read the books complained of as men and women of 1954. As it was, the jury could only draw the conclusion that it would be dangerous to take present day standards of literature into account in applying the test laid down in *Reg.* v. *Hicklin*.[2]

[GERRARD J. The jury was asked by the defence to read a number of other books on sale to the public on which no prosecutions had been brought in order to decide whether the books complained of were obscene.]

The object of the defence in producing the other books was to indicate to the jury the kind of books read by the public today.

[LORD GODDARD C.J. Is there any authority for the proposition that at a trial for obscene libel the defence is entitled to put in evidence other books, which are not the subject of prosecutions, and to ask the jury to read them? Such books are not relevant and I doubt whether they are admissible in evidence.]

Had the recorder ruled that such evidence was not admissible it would not have affected the main submission for the defence, but if evidence of other books is not admissible it is difficult to see how the jury is to apply the test in the light of the standards of today.

[LORD GODDARD C.J. referred to *Galletly* v. *Laird*.[3] It is a matter for the common sense of the jury. The test in *Reg.* v. *Hicklin*[4] is still the law. I doubt whether it is necessary for a judge to do more than read that test to the jury and tell them to read the books.]

Christmas Humphreys for Reiter and Gaywood Press Ld. The case was not fairly tried. The summing up was not a summary of the evidence but a direction to follow the opinion of the recorder. In comparison with most books in respect of which there have been prosecutions during the last 30 years the books complained of were not obviously erotica. It is agreed that they were printed and published and widely distributed and that the jury must decide as to their nature, but in applying the test of obscenity they should be given every opportunity of considering the code of morals and education of the public existing at any particular time. Those standards are changing all the time. Books once banned are now no longer banned.

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[2] L.R. 3 Q.B. 371.

[3] 1953 S.C.(J.) 16.

[4] L.R. 3 Q.B. 360, 371.

J. M. Griffiths-Jones, for the Crown, was not called upon.

LORD GODDARD C.J., delivering the judgment of the court. The appellants in this case were convicted before the Recorder of London and a jury of publishing an obscene libel. The indictment contained seven counts and there were seven books, the titles of which I refrain from mentioning because I have no desire to give any advertisement to this shocking literature. The jury convicted in respect of all seven counts.

This appeal is brought entirely on the summing up of the recorder. Let me say at once that that summing up was perhaps rather more rhetorical than one could have wished, but the recorder evidently felt strongly, and it is very difficult for a judge to control his feelings when he is dealing with such material as there is in this case. I do not wonder that the recorder spoke strongly, although it would have been better if he had reminded the jury in so many words that it was entirely for them to say whether these were obscene libels or not; but he did remind them more than once that if they had any doubts about the matter they should acquit. He was not, therefore, in any sense directing the jury to return a verdict of guilty, and they could have acquitted in respect of some of the charges. On the other hand, the recorder did write down the definition of obscenity for the jury, and he told them to consider the case from that point of view. The classic definition delivered by Cockburn C.J. in the Queen's Bench in 1868, in *Reg.* v. *Hicklin*,[1] was [2]: "The test "of obscenity is this, whether the tendency of the matter charged "as obscenity is to deprave and corrupt those whose minds are "open to such immoral influences, and into whose hands a "publication of this sort may fall."

We are being asked to upset this conviction because the recorder did not say something to the jury about the standards of today. He said, and this court entirely agrees with him, that the law is the same now as it was in 1868, and indeed Mr. Howard, in the forcible remarks he addressed to the court, has not sought to say differently. If that is so, the jury have to consider whether today these books have a tendency "to deprave and corrupt "those whose minds are open to such immoral influences, and "into whose hands a publication of this sort may fall." When one is considering whether they have such a tendency, one's mind naturally turns to depraving or corrupting young people into whose hands they may fall. There are, no doubt, dirty-minded elderly people, but it is not to be expected that many elderly people would read these books. Younger people are more likely to, and we are told that they circulate in the Armed Forces. The jury have to consider whether, looking at these books altogether, they would tend to corrupt and deprave, or whether they would not. It is common knowledge that nowadays novelists and writers discuss things which would not have been discussed in the reign of Queen Victoria; of well-known novelists George Eliot went perhaps in some places as far as the tendencies of her times allowed, and Anthony Trollope thinly veiled certain things which nowadays many people would discuss between themselves, and they would not be thought any the worse for discussing them. But it is one thing to discuss a particular subject; it is quite another to discuss and write about it in the way it is discussed and written about in these books, which, unfortunately, I have had to look at for the purposes of this appeal. It seems to me idle to contend that these books do not exhibit the tendency which Cockburn C.J. described in 1868. All I can say in mitigation in this case is that it seems to me that these men have been trying to sail as near to the wind as possible, and now find that they have gone too near.

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[1] (1868) L.R. 3 Q.B. 360.

[2] Ibid. 371.

The matter I do desire to say a word about with regard to this case is a matter of law. It appears that in the course of the case a large number of other books were produced, and the jury were asked to look at them to decide whether these particular books were obscene. That seems to me to be absolutely wrong. In the course of the argument the registrar has handed to me the report of *Galletly* v. *Laird*,[3] in which matters relating to obscene literature were discussed in prosecutions under the Burgh Police (Scotland) Act, 1892; but the principles which the court was laying down there are the same as apply in this case. I notice

[3] 1953 S.C.(J.) 16.

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that the Lord Justice-General, who gave the leading judgment, said[4]: " I am not dismayed by the idea that the opinion of the " magistrate before whom the case is brought is virtually deter- " minative of the question whether the books or pictures libelled " are or are not indecent or obscene. Once it is understood that " the emphasis falls to be laid upon the second of the elements " defined above, it seems to me to be not only intelligible but " inevitable that the character of the offending books or pictures " should be ascertained by the only method by which such a fact " can be ascertained, viz., by reading the books or looking at " the pictures. The book or picture itself provides the best " evidence of its own indecency or obscenity or of the absence " of such qualities; and if in any case the magistrate's decision is " challenged, the only method by which an appellate tribunal " could determine whether the magistrate was entitled to reach " the conclusion which he did would be by examining the book " or picture, not with a view to re-trying the case but solely " with a view to discovering whether they revealed evidence on " which a reasonable magistrate would be entitled to condemn " them as indecent or obscene."

Later, and I hope that this will be noticed, because in our opinion it states the law which applies in England as it does in Scotland, the Lord Justice-General said[5]: " The magistrate dis- " allowed cross-examination by the complainer's solicitor and " positive evidence tendered for the defence designed to show that " books other than those referred to in the complaint circulated " freely in Paisley and were available in the local public library, " the suggestion apparently being that these other books were not " materially different in character from those complained of. I " consider that the magistrate's ruling was right. The character " of other books is a collateral issue, the exploration of which " would be endless and futile. If the books produced by the " prosecution are indecent or obscene, their quality in that " respect cannot be made any better by examining other books, or " listening to the opinions of other people with regard to these " other books."

From time to time, with regard to prosecutions relating to indecent literature, questions have been raised about what the law is with regard to other evidence of comparison, and so forth. The opinion of the High Court of Justiciary as delivered by the Lord Justice-General in *Galletly* v. *Laird*[6] puts the matter, in

[4] 1953 S.C.(J.) 26.

[5] Ibid. 27.

[6] Ibid. 16.

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my opinion, as well as it can possibly be put, and this court desires to adopt every word of it. It will be understood, I hope, in future that where there are prosecutions, whether under the Obscene Publications Act, 1857, which concerns the sale of indecent literature, or whether for the offence of publishing an obscene libel, that that is the law and that it is to be regarded equally as the law in this country as it is in Scotland.

As I have said, the only possible ground of criticism in this case is that the recorder's summing up put the matter strongly; but this court cannot possibly say that there was a misdirection of the jury, although it would have been better if he had used some expressions other than those he did use. Nevertheless, he did leave the question to the jury to decide and as an appellate court, having examined these books in the way the Lord Justice-General says, it seems to me that if the jury had returned a different verdict, although this court could not have interfered with it, we could fairly have said that it was a perverse verdict. Accordingly, this appeal is dismissed.

With regard to the sentences, the recorder took the view that these were serious offences, and that the appellants Reiter and Carter were deserving of sentences of imprisonment. It is high time that the publication of this kind of thing was stopped, and stopped in such a way as to indicate that other persons offending in like manner should know the view of the court. We cannot say that the sentences passed by the recorder in any way erred in principle, and therefore the appeals against sentence are also dismissed.

Appeals dismissed.

Solicitors: *Gerald Samuels & Co.; Lewis & Lewis and Gisborne & Co.; Director of Public Prosecutions.*

FROST *v.* JOHN SUMMERS & SONS LD.

[1952 F. No. 1987.]

C. A.
1954
Mar. 10, 11, 12, 19.
Somervell, Birkett and Morris L.JJ.

Factory—Dangerous machinery—Fencing—Grindstone—Duty to fence securely though rendering machinery unusable—Alleged negligence of operative—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).
Statutory Duty—Breach—Contributory negligence.

Section 14 (1) of the Factories Act, 1937, provides that: "Every "dangerous part of any machinery . . . shall be securely fenced

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"unless it is in such a position or of such construction as to be as "safe to every person employed or working on the premises as it "would be if securely fenced."

The plaintiff, a maintenance fitter, while engaged in the defendants' steel works, in grinding a piece of metal, suffered injury to the thumb of his right hand by contact with the grindstone, which was revolving at about 1,450 revolutions a minute. The upper part of the machine was guarded by a fixed guard or hood and at the base there was an adaptable tool rest, but a portion of the stone was unguarded:—

Held (*per* Birkett and Morris L.JJ.; Somervell L.J. dissenting), that in the absence of regulations modifying the requirements of section 14 (1) the duty of the defendants to fence securely the grindstone was an absolute one, and the fact that compliance with that subsection might render the machine unusable did not absolve the defendants from their duty to fence, and that they were therefore in breach of their statutory duty and liable in damages to the plaintiff.

Davies v. *Thomas Owen & Co. Ld.* [1919] 2 K.B. 39, *Miller* v. *William Boothman & Sons Ld.* [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333, and observations of Lord Thankerton and Lord Simonds in *Nicholls* v. *F. Austin* (*Leyton*) *Ld.* [1946] A.C. 493, 499, 505; 62 T.L.R. 320; [1946] 2 All E.R. 92, and of Lord Porter in *Carroll* v. *Andrew Barclay & Sons Ld.* [1948] A.C. 477, 486; 64 T.L.R. 384; [1948] 2 All E.R. 386 applied.

Decision of Donovan J. in *Pugh* v. *Manchester Dry Docks Co. Ld.* [1954] 1 W.L.R. 389; [1954] 1 All E.R. 600 approved.

Judgment of Jones J. reversed.

Appeal from Jones J.

On November 27, 1951, the plaintiff, an experienced maintenance fitter, was employed at the defendants' factory at Hawarden Bridge Steel Works, near Chester, in grinding a piece of metal about four inches long, described as a key, at a machine which consisted of a grindstone, the spindle of which ran through its centre to allow the power to be applied to rotate the stone, an adaptable tool rest on which the metal to be ground was rested, and a fixed guard or hood covering a portion of the grindstone but yet leaving about seven inches unguarded. The grindstone was being revolved at about 1,450 revolutions a minute. In these circumstances the thumb of the plaintiff's right hand came in contact with the grindstone and he sustained injury. He brought the present action against his employers claiming damages on the ground, inter alia, that they had been guilty of a breach of their statutory duty under section 14 (1) of the Factories Act, 1937,[1] to fence securely what was a dangerous part of the machinery.

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[1] Factories Act, 1937, s. 14: "(1) Every dangerous part of any "machinery, other than prime movers "and transmission machinery, shall

Jones J. held that the machinery in question was dangerous, but that it was securely fenced and properly guarded by the guard at the top and the "rest" at the bottom, and that there was therefore no breach of statutory duty. He further held that the plaintiff's injury was caused by his own negligence.

The plaintiff appealed.

Marven Everett Q.C. and *R. Geraint Rees* for the plaintiff. The trial judge has found that the machine was dangerous but that it was sufficiently guarded if it was properly used. If a machine is dangerous and it is not so securely fenced as to be as safe as it can possibly be, then the employers have not complied with section 14 (1) and they have committed a breach of their statutory duty. If the machine was not properly adjusted then there had also been common law negligence by the employers.

[BIRKETT L.J. If you guard a machine so that a careless workman will not be endangered then it might be impossible for the machine to be used.]

We do not shrink from that. The duty under section 14 (1) is absolute. The regulations made by the Minister, modifying the duty of employers under certain sections of the Factories Act, do not apply to fencing against contact. In *Davies* v. *Owen (Thomas) & Co.*[2] Salter J. held that if a dangerous part of a machine could only be made safe by rendering it commercially unusable, then it should not be used. In *Miller* v. *William Boothman & Sons Ld.*[3] the Court of Appeal approved Salter J.'s decision. Lord Porter in *Carroll* v. *Andrew Barclay & Sons Ld.*[4] said that securely fencing meant that some barrier had to be erected which would prevent any employee from making contact with the dangerous part of the machine; in the present case, the grindstone. In *Pugh* v. *Manchester Dry Docks Co.*[5] Donovan J. applied *Davies* v. *Owen (Thomas) & Co.*,[6] and held that even if compliance with section 14 (1) rendered the machine unusable

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"be securely fenced unless it is in "such a position or of such construction as to be as safe to every "person employed or working on the "premises as it would be if securely "fenced: Provided that, in so far as "the safety of a dangerous part of "any machinery cannot by reason of "the nature of the operation be "secured by means of a fixed guard, "the requirements of this subsection "shall be deemed to have been complied with if a device is provided "which automatically prevents the "operator from coming into contact "with that part."

[2] [1919] 2 K.B. 39.

[3] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[4] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[5] [1954] 1 W.L.R. 389; [1954] 1 All E.R. 600.

[6] [1919] 2 K.B. 39.

the employers were not absolved from their duty to fence securely. The trial judge having found as a fact that the machine was dangerous, ought to have held further that it was not securely fenced.

R. H. Forrest Q.C. and *Norman Richards* for the defendants. The plaintiff's appeal must be rather an artificial one. The trial judge, on the evidence, found that, from the point of view of careful employers, the defendants had done nothing wrong, and that the accident was due to the plaintiff's own negligence. The defendants challenge the judge's finding that the machine was dangerous. It is agreed that the regulations made by the Minister do not deal with the guarding of dangerous machines, but in order to succeed the plaintiff must satisfy the court that safe fencing means complete fencing. If that is right, every person who uses a power-driven grindstone is committing a criminal offence, and if the argument for the plaintiff is right, the Minister has made regulations telling employers how they are to commit a criminal offence. Prima facie, it is improbable that the Minister would do that, and there must be some other explanation. It is submitted that the explanation is that, in the Minister's opinion, these are not dangerous parts of machinery which call for action by him, or that secure fencing may vary from machine to machine. Salter J. in *Davies* v. *Owen* (*Thomas*) *& Co.*[7] did not define what he meant by secure fencing, and in that case a jury decided that the fencing was not secure. Security must vary according to the function of the machine. When the Factories Act of 1937 was passed Parliament must be assumed to have known what regulations had been made, and it is clear from a pamphlet issued by the factory inspectors who advised the Minister that the machinery was only to be securely fenced as far as practicable. The Home Secretary has not prohibited the use of these grinding machines, and has not deemed it necessary to issue regulations dealing with guards. In the case of grindstones "securely fenced" cannot be equated with "completely guarded." Once one gets away from completely guarded it becomes a matter of evidence as to what is required. The only evidence before the trial judge whether the machine was securely guarded was that called by the plaintiff, and was to the effect that the gap left was the smallest possible if the machine was still to be usable. The trial judge has found, in effect, that it was a normal machine, and that it was guarded as securely as would allow it to be operated. Even if a breach of statutory duty is proved there still remains the question whether the breach was the cause of the accident. *Miller* v. *William Boothman & Sons Ld.*[8] dealt only with particular machines, namely, circular saws, and is distinguishable. The court is entitled to take into consideration the fact that a very large number of these grinding machines are in use, and that the Home Office factory inspectors have found no fault in them.

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[7] [1919] 2 K.B. 39.

Everett Q.C., in reply, referred to *Atkinson* v. *London and North Eastern Railway Co.*,[9] *Dennistoun* v. *Charles E. Greenhill Ld.*,[10] and *Fowler* v. *Yorkshire Electric Power Co. Ld.*[11]

Cur. adv. vult.

March 19. The following judgments were read.

SOMERVELL L.J., having read section 14 (1) continued: The plaintiff is a fitter who has been employed for some years by the defendants. In the defendants' factory were two circular grindstones of which we have photographs, at one of which the accident happened. In front of each grindstone is a stand on which is a flat-bottomed basin. From the floor of the basin there rises a rest which overlaps the wheel. Above the rest the wheel is exposed for about six or seven inches so that it can be used for grinding. Above the exposed part there is a hood which is continued over the top and round the back of the stone. The stones were driven by power at about 1,450 revolutions a minute.

The plaintiff was grinding the ends of a piece of metal about four inches long, known as a key. Counsel agreed that the plaintiff demonstrated he was holding the key near the top. He placed it, he said, on the tool rest, took the pressure with an upward movement, and added the pressure to grind. He added: "The instant I added the pressure, the key flicked forward to the "stone with my thumb in between, towards the stone itself, "causing a crushing effect which caused me to snatch my thumb "out." This is very difficult to follow. Many allegations were made by the plaintiff. It was said that the wheel was running out of the true; that there was an excessive and dangerous gap between the rest and the wheel, and that the lighting was insufficient. On all these points the plaintiff failed on the judge's findings of fact and there is no appeal on these points.

There remains the submission that there was a breach of section 14 which caused the accident. I will read the judge's conclusions. "If the machinery is dangerous, it has got to be "fenced or guarded properly. I have no doubt that the "machinery should be regarded as dangerous: in other words, "that this was a dangerous part of the machine, and every "dangerous part of any machinery, according to the section, "should be securely fenced; therefore, this should have been "securely fenced. The question is: was it securely fenced? I "think, judging by the evidence I have heard, I must come to "the conclusion that it was securely fenced. Of course, it could "be completely covered up so that no one could get anywhere "near it. Then it would be even more securely fenced, but "it would be of no use as a machine. It has this guard at the "top and it has the rest at the bottom, which is in the nature "of a guard, leaving a comparatively small part of it exposed, "and Mr. Martin [a consultant engineer] was of the opinion "that it was not dangerous in that state. He said, as I have "already observed, that he had no criticism to make of it and "that it was in accordance with modern practice. I think he "was quite satisfied that it was safe to use in that state. He "did not suggest any further guarding or fencing was necessary. "The plaintiff, himself a practical person, seems to have taken "the same view. He said that the guard had nothing to do with "his accident. I understood him to say that it was not the "absence of or deficiency in any guard that caused the accident. "Therefore, in those circumstances, it seems to me that the "correct conclusion is that the machinery, if not properly guarded "would be dangerous, but that it was properly guarded by the "guard at the top and by the rest at the bottom. In these "circumstances I hold that there is no breach of section 14."

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[8] [1944] K.B. 337.

[9] [1926] 1 K.B. 313.

[10] [1944] 2 All E.R. 434.

[11] [1939] 1 All E.R. 407.

It is clear that when the judge finds that the machinery should be regarded as dangerous he is speaking of the rotating wheel as a whole. "Fenced" as it is by the "rest" and the hood the remaining exposed part is not, he finds, "dangerous" within the section. The first question for this court is whether this is consistent with the authorities as to the meaning of dangerous in this context. If it is not, then the result would or might be that the grindstone must be fenced so that it could not be used. It has been held by this court that section 14 can lead to this result: *Miller* v. *William Boothman & Sons Ld.*[1] It seems surprising if the legislature has made it a criminal offence to use a grindstone. In *Walker* v. *Bletchley Flettons Ld.*[2] du Parcq J. had to consider the meaning of "dangerous" in a similar context in the Act of 1901. He cited two observations by Wills J. in *Hindle* v. *Birtwistle*,[3] concerning a similar provision in the Act of 1878. "It seems to me that machinery or parts of machinery is and are "dangerous if in the ordinary course of human affairs danger may "be reasonably anticipated from the use of them without protec-"tion. . . . In considering whether machinery is dangerous, the "contingency of carelessness on the part of the workman in "charge of it, and the frequency with which that contingency is "likely to arise, are matters that must be taken into considera-"tion." The judge put a gloss on that which, with respect, I do not think adds anything to what Wills J. said, if the two citations are taken together. I would add a third from the same judgment. "No doubt it would be impossible to say that because "an accident had happened once therefore the machinery was "dangerous."

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[1] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[2] [1937] 1 All E.R. 170.

I therefore turn to the evidence. The plaintiff agreed that this was the ordinary type of grindstone, although he said that in his last factory the exposed part of the wheel was somewhat smaller. That would not have affected this accident. The plaintiff's case was that the gap was too wide, about half-an-inch instead of, say, three-sixteenths of an inch. This, as I have said, failed. Mr. Alexander, a fitter employed by the defendants, called by the plaintiff, thought that the machine was quite safe if the rest was close up to the rim. Mr. Martin, a consultant engineer, the plaintiff's expert, had, as the judge said, no complaint of the machine if properly adjusted. It was a perfectly normal machine. There was no evidence or suggestion that this machine had caused accidents before. Of course, a wheel revolving at this rate is likely to cause damage if a finger or hand is placed upon it. In the same way, a lorry on the road will cause injury if a man steps out suddenly in front of it. Many, perhaps most, machines at which men work are capable of injuring a finger or a hand. In the present case, the plaintiff was grinding a smaller piece of metal than is usual. He could have used other appliances. He held it high up and on the judge's findings it seems to me clear that he had a lapse or did something which I do not think was, on the evidence, reasonably to be anticipated. Prima facie whether a part of machinery is dangerous was a question of fact for the trial judge and I agree with his conclusion, basing myself on the tests laid down by Wills J.

[3] [1897] 1 Q.B. 192, 195; 13 T.L.R. 129.

The second point does not, therefore, arise. Although we are bound by *Miller's* case [4] I feel considerable difficulty about it, and, of course, the difficulty increases as the standard of what is dangerous becomes more—if I may so put it—automatic. Parliament cannot have intended to prohibit the use of rotating grindstones. If the purpose had been to prohibit by statute the use altogether of certain types of machine the words of section 14 are a very curious approach. They assume that the machine is there in situ, but it is to be permanently caged. As, however, we are precluded from reconsidering previous decisions of this court it is unnecessary to pursue the matter further. In *Lewis* v. *Denye* [5] the House of Lords expressly reserved the point and I hope that it may have an opportunity of deciding it.

I would therefore dismiss the appeal. My brethren take a different view and the order will be in accordance with their decision.

BIRKETT L.J. stated the facts and continued: The plaintiff alleged in his original pleading of October 9, 1952, that the defendants were guilty of negligence at common law. He said that the wheel of the grindstone was unevenly worn and was running out of true: that the work-rest was improperly adjusted so that there was left a dangerous gap between the rest and the wheel: that the artificial lighting in which he worked was inadequate: and that there was no adequate or proper maintenance and supervision. By an amendment of the statement of claim made on June 16, 1953, the plaintiff further alleged that the accident was caused by the defendants' breaches of statutory duty. He relied upon section 14 (1), section 16, and section 5 (1) of the Factories Act, 1937.

The defendants denied all the allegations of negligence and breaches of statutory duty, and alleged that the accident was caused by the negligence of the plaintiff himself. After hearing the evidence Jones J. held that all the allegations of negligence failed, that there was no breach of statutory duty and that the accident was caused by the negligence of the plaintiff. In this court the argument on behalf of the plaintiff has been concerned almost wholly with the submission that the defendants were in breach of section 14 (1) of the Factories Act, 1937, which provides that: "Every dangerous part of any machinery . . . shall "be securely fenced." Jones J. found the grindstone to be "a

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[4] [1944] K.B. 337.

[5] [1940] A.C. 921; 56 T.L.R. 900; [1940] 3 All E.R. 299.

"dangerous part of the machine," but also that it was in fact securely fenced. The plaintiff said in the court below that "the "guard had nothing to do with my accident; not the top guard." and attributed the accident to causes which the judge has rejected: but that does not preclude the submission that the wheel of the grindstone was not securely fenced and that that breach of duty was the cause of the accident.

The first question to be considered is: Was this grinding wheel, revolving at 1,450 revolutions a minute, a dangerous part of the machinery? In *Walker* v. *Bletchley Flettons Ld.*[6] du Parcq J. said: "In considering whether machinery is dangerous, "it must not be assumed that everybody will always be careful. "A part of a machine is dangerous if it is a possible cause of "injury to anybody acting in a way in which a human being may "be reasonably expected to act in circumstances which may "reasonably be expected to occur." And in *Stimpson* v. *Standard Telephones and Cables Ld.*[7] he said that the behaviour of which he had spoken in the earlier case was such behaviour as was reasonably foreseeable, and was not necessarily confined to such behaviour as is reasonable behaviour. I cannot doubt that, in applying these tests to the facts of this case, Jones J. was right in holding that this was "a dangerous part of the machinery."

The second question, and a much more difficult one, is: was the dangerous part adequately fenced? From *Davies* v. *Owen (Thomas) & Co. Ld.*[8] it is clear that where the duty to fence exists, the obligation is absolute; and Salter J. said [9]: "It is an obliga-"tion not merely to fence, but to fence securely. The statute "does not say that dangerous machinery shall be fenced if that is "commercially practicable or mechanically possible. If a "machine cannot be securely fenced while remaining com-"mercially practicable or mechanically useful the statute in "effect prohibits its use." In *Miller* v. *William Boothman & Sons Ld.*[10] Goddard L.J., delivering the judgment of the Court of Appeal, said [11]: "Turning again to the authorities, it follows "from what we have said that, in our opinion, *Davies* v. *Owen* [12] "was rightly decided, and that, as a general proposition, we "agree with the passage in Salter J.'s judgment to which we "have already referred. It should, however, be qualified by say-"ing that the statute prohibits the use of a dangerous machine

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[6] [1937] 1 All E.R. 170.

[7] [1940] 1 K.B. 342; 56 T.L.R. 90; [1939] 4 All E.R. 225.

[8] [1919] 2 K.B. 39.

[9] Ibid. 41.

[10] [1944] K.B. 337.

[11] Ibid. 341.

[12] [1919] 2 K.B. 39, 41.

"which cannot be securely fenced unless it is one which is "subject to special regulations, and is used and constructed in "accordance therewith." There are no special regulations affecting the question of fencing in this case, although special regulations dealing with the grinding of metals have been made under section 60 of the Factories Act, 1937. The duty to fence securely in this case is, therefore, absolute. It is clear, moreover, that the secure fencing referred to in section 14 (1) of the Act is secure fencing against the danger of contact between the part to be fenced and the person employed.

In *Nicholls* v. *Austin (F.) (Leyton) Ld.*[13] Lord Simonds said that the fencing "was intended to keep the worker out," and in *Carroll* v. *Andrew Barclay & Sons Ld.*[14] Lord Porter said: "Fencing, in my opinion, means the erection of a barricade to "prevent any employee from making contact with the machine, ". . ." Jones J. states his conclusion on this point as follows: "I think, judging by the evidence I have heard, I must come to "the conclusion that it was securely fenced. Of course, it could "be completely covered up so that no one could get anywhere "near it, then it would be even more securely fenced, but then it "would be no use as a machine. It has this guard at the top "and it has the rest at the bottom, which is in the nature of "a guard leaving a comparatively small part of it exposed, and "Mr. Martin was of the opinion that it was not dangerous in that "state. He said, as I have already observed, that he had no "criticism to make of it and that it was in accordance with "modern practice. I think he was quite satisfied that it was "safe to use in that state. He did not suggest any further guarding or fencing was necessary. The plaintiff himself, a practical "person, seems to have taken the same view. He said that the "guard had nothing to do with his accident. I understood him "to say that it was not the absence or deficiency in any guard "that caused this accident. Therefore, in those circumstances, "it seems to me that the correct conclusion is that this "machinery, if not properly guarded, would be dangerous, but "that it was properly guarded by the guard at the top and by "the rest at the bottom. In those circumstances, I hold that "there is no breach of section 14."

But this is tantamount to saying that it could not be more securely fenced without making the machine unusable, and the

[13] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

[14] [1948] A.C. 477, 486; 64 T.L.R. 384; [1948] 2 All E.R. 386.

decision in *Miller* v. *William Boothman & Sons Ld.*[15] makes it quite clear that this is not the proper construction of section 14 (1). It would seem to be clear that if the wheel was dangerous, and must therefore be securely fenced to prevent the workman coming into contact with it, and a seven-inch gap is left unfenced, that the statutory duty has not been fulfilled. I am far from accepting the view that this grindstone could not be securely fenced without making it unusable, but that is not a matter with which I am now concerned. The only questions are: was the wheel dangerous, and, if so, was it securely fenced? I am driven to the conclusion that it was not securely fenced, and that the defendants were, therefore, in breach of their statutory duty under section 14 (1) of the Act of 1937.

[His Lordship referred to the evidence given by Mr. Martin, the consultant engineer called on behalf of the plaintiff, and continued:] But nothing that Mr. Martin said could exclude the manifest danger from the exposed wheel, if the hand of the operator came in contact with it: and all that he was saying was that the wheel was fenced in so far as it was practicable to do so, and that with care an operator could avoid coming in contact with the wheel. In my opinion that was not the question before the judge. The question was whether the defendants had fulfilled their statutory duty to fence securely the dangerous part of this machine. In *Pugh* v. *Manchester Dry Docks Ld.*[16] Donovan J. was faced with very much the same situation with which we are faced in this appeal, and in a considered judgment came to the conclusion that the defendants in that case were guilty of a breach of statutory duty. In my opinion, with respect, he came to the right conclusion on the authorities, adding that "the deadlock can be resolved only by the House of Lords or by Parliament."

There remains the question of contributory negligence. Jones J. held that the accident was solely due to the negligence of the plaintiff, that negligence consisting in the way he held the piece of metal when applying it to the grindstone. In my opinion, if the defendants had fulfilled their statutory duty and fenced the wheel securely the accident would not have happened at all, and it was the breach of statutory duty that caused the accident and the consequent injury to the plaintiff. The judge said that it was unnecessary to go into the question of whether the plaintiff might have done this job in some other way, and then added: "If he could not do (this operation) without putting his

[15] [1944] K.B. 337.

[16] [1954] 1 W.L.R. 389; [1954] 1 All E.R. 600.

"fingers into a dangerous position, as he did, he ought not to have "been at this grindstone at all: he ought then to have used the "other method suggested to him of putting the key in a vice and "using a file or possibly using the portable grindstone." I do not think that the plaintiff was at fault in using this power-driven grindstone, and the question of alternative methods does not arise. He was not doing anything wrong or stupid or forbidden in using the grindstone, and in my opinion this appeal should be allowed and judgment entered for the plaintiff for the sum of £261 6s. 0d., the amount provisionally assessed by the judge.

Morris L.J. The judge held that the allegations made by the plaintiff that there was no proper lighting and that there had been a negligent failure to maintain the grinding machine in satisfactory condition failed. It is in regard to his further finding, that there was no breach of section 14 of the Factories Act, 1937, that complaint is made. He held that it was a perfectly safe machine to use, having a guard above and the rest below, if a person used it in the proper way. Holding that the exposed part of the grinding wheel was a dangerous part, he said: "The "question is: was it securely fenced? I think, judging by the "evidence I have heard, I must come to the conclusion that it "was securely fenced. Of course, it could be completely covered "up so that no one could get anywhere near it. Then it would "be even more securely fenced, but then it would be no use as "a machine." Having referred to the fact that with the guard at the top and the rest at the bottom, there was only "a comparatively small part of it exposed," upon a consideration of the evidence the judge came to the conclusion that the machine was properly guarded.

The fact remains, however, that while operating the grinding machine the plaintiff was injured, because his hand came into contact with the revolving grindstone. The mechanically produced revolutions were at a speed of 1,450 revolutions per minute. If the hand of an operator came into contact with this swiftly moving grindstone physical hurt would seem to be inevitable. I can entertain no doubt that in these circumstances the exposed grindstone, or any part of the exposed grindstone, was a "dangerous part." The question then arises whether it was "securely fenced." Certain regulations relating to the grinding of metals were made by the Secretary of State in 1925, under section 79 of the Factory and Workshop Act, 1901, and by the Minister of Labour and National Service in 1950 under section 60 of the Factories Act, 1937, and by virtue of other Acts. None of these regulations refers to fencing and it is not suggested that there has been any modification of the statutory requirement of secure fencing.

It is said, however, that the regulations must have been issued on the basis that grinding machines can lawfully be used, and a safety pamphlet, officially issued, was referred to in which no complete guarding or fencing is portrayed. It was submitted that these circumstances pointed to the conclusion that the grinding machine under consideration in the present case must be or can be regarded as having been securely fenced. I do not find any sure foothold in this contention. At its highest it depends upon what it is suggested that somebody may have thought. But there is no necessary implication of what anyone may have thought and, in any event, the problem remains of applying a statutory provision which is in force and applicable to the facts as they exist.

I can see no escape from the view that the exposed part of the swiftly moving grindstone (which I consider was a dangerous part) was not securely fenced. The statutory obligation is clear and definite. There is no qualification or modification to the effect that the part should, as far as reasonably practicable, be securely fenced. We were helpfully referred to a number of sections of the Act which, by contrast with section 14, contain modifying and qualifying provisions: these include sections 19 (3), 22 (4), 25 (3), 26 (1), and 47.

In *Nicholls* v. *F. Austin (Leyton) Ld.*[17] Lord Thankerton said that "the obligation to fence imposed by subsection 1 is an "obligation to provide a guard against contact with any dangerous part of a machine." Lord Simonds said[18]: "The fence "is intended to keep the worker out . . ."

The proviso to section 14 (1) is important. It reads: "Provided that, in so far as the safety of a dangerous part of any "machinery cannot by reason of the nature of the operation be "secured by means of a fixed guard, the requirements of this "subsection shall be deemed to have been complied with if a "device is provided which automatically prevents the operator "from coming into contact with that part." This seems to reinforce the view that secure fencing does not exist if an operator may come into contact with the dangerous part. In reference to the proviso Lord Simonds, in the case above cited, said: "These last six words make it clear that the security at which

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[17] [1946] A.C. 493, 499.

[18] Ibid. 505.

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"the substantive part of the subsection aims is security from "unintentional or I suppose even intentional contact with a "dangerous part." In *Carroll* v. *Andrew Barclay & Sons Ld.*[19] Lord Porter said: "Any risk arising from the working of a dangerous machine must be guarded against under section 14 . . .: "Fencing, in my opinion, means the erection of a barricade to "prevent any employee from making contact with the machine, "not an enclosure to prevent broken machinery from flying out."

It is suggested that if the grinding machine had been further fenced it could not have been effectively used. Mr. Martin, a consultant engineer called for the plaintiff, said that he had no criticism to offer of the guard and that the machine was guarded as far as was practicable in order to allow the machine to be used at all. If this be so, it seems to me to be irrelevant. The question is not whether further fencing would have impeded use but whether there was secure fencing. No dispensing power is provided for if there be cases where commercial practicability and compliance with the statute cannot co-exist: see *Davies* v. *Owen (Thomas) & Co. Ld.*[20] and *Miller* v. *William Boothman & Sons Ld.*[21] There was no occasion to test the view that no further fencing of the machine consistent with its user was practicable, but it seems surprising if the wit of practical scientists and engineers could not devise secure fencing which is not stultifying.

On the assumption that there was a breach of statutory duty on the part of the defendants, it was submitted that nevertheless the injuries to the plaintiff cannot be said to have been caused by the breach of duty since he could have used alternative methods of grinding or filing the key. It was said, therefore, that the injuries to the plaintiff were caused by his own deliberate act in using the grinding-machine in the condition in which it was. I do not think that this submission is sound. The plaintiff was not acting irregularly from his employers' point of view in using the grinding machine: it was there for him to use, and I have no doubt that the plaintiff considered that he was doing his work for his employers in the most appropriate way when he set out to use the grinding machine. He was not acting in a deliberately foolhardy way.

Lastly, it is said that the plaintiff was himself negligent and was, in part at least, the author of his own mishap. The line is always difficult to define at which maladroit or ill-advised method should be characterized as negligent. Nor is the plea that a man was doing his best any sure protector from a finding of negligence. In the present case, the plaintiff felt that he had to apply pressure and that his grip of the key had to be near to its end. As Lord Wright said in his speech in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[22]: " The policy of the statutory " protection would be nullified if a workman were held debarred " from recovering because he was guilty of some carelessness or " inattention to his own safety, which though trivial in itself " threw him into the danger consequent on the breach by his " employer of the statutory duty." While some measure of criticism can forcibly be suggested, I have come to the conclusion that any deficiencies or failures on the plaintiff's part fell short of negligent conduct. I would, therefore, allow the appeal and I consider that the plaintiff should recover the damages which were assessed.

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[19] [1948] A.C. 477, 486.

[20] [1919] 2 K.B. 39.

[21] [1944] K.B. 337.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *W. H. Thompson; Carpenters for Laces & Co., Liverpool.*

A. W. G.

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[22] [1940] A.C. 152, 179; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

REGINA *v.* R. W. PROFFITT LD.

1954
Mar. 19.

Jones J.

Hire-Purchase—Hire-purchase agreement—Meaning—Option to purchase—" Subject to the enactment of the necessary legislation "—Whether hire-purchase agreement—Agreement not fulfilling requirements of Hire-Purchase and Credit Sale Agreements (Control) Order, 1952 (*S.I.* 1952, *No.* 121), *art.* 1, *Sch.* 2*—Hire-Purchase Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *s.* 21.

In August, 1952, the defendant company hired a television set and aerial to one M. Clause 11 of the agreement provided: " If " the agreement shall continue in force for the period of two years " from the date hereof then the company shall afford the customer " the three alternatives following:—(*a*) Subject to the enactment of " the necessary legislation, to purchase the above-mentioned television set and the said aerial for the sum of one shilling . . ."

The company was charged with disposing of the set in pursuance of a hire-purchase agreement contrary to article 1 and the Second

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

Schedule to the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952,[1] in that the agreement failed to state the cash price, the initial deposit was less than that required by the Second Schedule, and the period during which the instalments might be paid was not limited to that prescribed by the Second Schedule. The Order of 1952 incorporated the definition of "hire-purchase "agreement" in section 21 of the Hire-Purchase Act, 1938[2]:—

Held, that the agreement was not a hire-purchase agreement within the meaning of section 21 of the Act of 1938, since by the inclusion of the words "Subject to the enactment of the necessary "legislation" an absolute right to buy the goods had not been conferred on the bailee and the property in the goods would not or might not pass to him, for there was no certainty if and when any such legislation would be passed. Accordingly, the agreement not being a hire-purchase agreement, the defendant company had committed no breach of the Order of 1952 and was entitled to be acquitted.

TRIAL on indictment at Manchester Winter Assizes.

The defendant company was charged on an indictment containing three counts relating to three transactions, the issue upon

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[1] Hire-Purchase and Credit Sale Agreements (Control) Order, 1952 (S.I. 1952, No. 121), art. 1: "A person "shall not dispose of any goods to "which this Order applies in pur-"suance of a hire-purchase or credit "sale agreement entered into after "January 31, 1952, unless the require-"ments specified in the Second "Schedule hereto are or have been "satisfied in relation to that agree-"ment."

Sch. 2, para. 2: "The agreement "contains in respect of each descrip-"tion of goods a statement of the cash "price of the goods of that description "comprised in the agreement. . . ."

Para. 3: "Before the signing of "the agreement actual payment was "made in respect of each description "of goods comprised in the agreement "of not less than an amount equal to "[33⅓ per cent.] of the aggregate of "—(*a*) the cash price of the goods of "that description comprised in the "agreement; and (*b*) any amount "payable by instalments. . . ."

Para. 4: "The agreement contains "provision for the payment of the "balance due, in respect of each "description of goods comprised in "the agreement, by approximately "equal instalments at equal intervals "spread over a period not exceeding "[18 months]."

Art. 6 (2): ". . . 'Hire-purchase "'agreement' means a hire-purchase "agreement as defined by section 21 "of the Hire-Purchase Act, 1938. . . ."

[2] Hire-Purchase Act, 1938, s. 21: ". . . 'Hire-purchase agreement' "means an agreement for the bail-"ment of goods under which the "bailee may buy the goods or under "which the property in the goods will "or may pass to the bailee, and "where by virtue of two or more "agreements, none of which by itself "constitutes a hire-purchase agree-"ment, there is a bailment of goods "and either the bailee may buy the "goods, or the property therein will "or may pass to the bailee, the "agreements shall be treated for the "purposes of this Act as a single "agreement made at the time when "the last of the agreements was "made."

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each being identical, and the first count charged the company with disposing of goods contrary to regulation 55 of the Defence (General) Regulations, 1939, the particulars being that on August 13, 1952, the company disposed of a television receiving set to Eric James Marsh in pursuance of a hire-purchase agreement entered into in contravention of article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952,[1] in that the requirements specified in the Second Schedule to the Order had not been satisfied.

The three unsatisfied requirements were that (1) the agreement failed to state the cash price; (2) the initial deposit was less than that required by the Second Schedule; (3) the maximum period during which hire-purchase instalments could be paid to comply with the Second Schedule was less than the period stated in the rental agreement. "Hire-purchase agreement" was defined in the Order by reference to section 21 of the Hire-Purchase Act, 1938.[2]

The agreement in question was headed "Rental of television "set and aerial installation" and gave details of the customer, the set, the installation charge, date and agreed weekly rental. It continued: "In consideration of the payment of the before-"mentioned installation charge and weekly rental R. W. Proffitt "Ld. (hereinafter called 'the company') hereby rent to the "customer the television set and aerial installation and hereby "undertake to maintain the above-mentioned television set and "the said aerial installation in reasonable working order subject "[inter alia] to the conditions following:— . . . 10. This agree-"ment of rental shall continue in force for the period of two years "from the date hereof but may be terminated at the option of "the customer at any time after the expiration of the period of "thirty weeks from the date hereof provided the customer shall "give to the company one month's notice in writing of his or her "intention to terminate this agreement of rental any time after "the expiration of the said period of thirty weeks. 11. If this "agreement shall continue in force for the period of two years "from the date hereof then the company shall afford the "customer the three alternatives following:—(*a*) Subject to the "enactment of the necessary legislation, to purchase the above-"mentioned television set and the said aerial for the sum of one "shilling. (*b*) To renew this rental agreement for a third and "fourth year under the same terms and conditions as are con-"tained herein but at a reduced rental of 5s. 6d. per week. (*c*) To

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[1] See note 1 on p. 36.

[2] See note 2 on p. 36.

"renew this rental agreement for a third and fourth year under "the same terms and conditions as are contained herein but "excluding the provisions of clause 2 of this agreement. In "consideration of the withdrawal of the provision for maintenance the company agrees that the rental charge for the third "and fourth years shall be at the rate of one shilling per year."

The agreement which was made in August, 1952, was stamped and signed by both parties.

C. T. B. Leigh for the Crown. In considering the definition of "hire-purchase" in section 21, the word "may" in "will or "may pass" cannot grammatically have a permissive sense. To say that property "may" pass cannot mean that it has the right to pass; it must mean if it passes by the exercise of the option and by the necessary legislation at the end, which is a contingency. The continued existence of the chattel, the continued payment of instalments by the hirer, or the exercise of the option at the end, are all contingencies and they rank exactly the same. Unless it has that meaning it would mean that the vast majority of hire-purchase agreements would not come under the Act at all because they would depend on a contingency exercised by the hirer under his option. At the time that the agreement is entered into it is immaterial whether one refers to the passing of the legislation or the hirer exercising his option. The part of the agreement in clause 11 which provides "subject to the enactment of the necessary legislation" is merely a smoke-screen which conveys nothing, except that it might protect the company at the very end from committing a further illegality, that is, parting with the chattel. The time to look at the agreement is when the agreement is made. It is impossible to say that when this agreement was made a position might not arise that in 1954 the property in the goods might pass under that agreement. If the question is asked: "Under this agreement, looking at it in 1952, may this property "in the chattel pass in 1954?", the answer must be "Yes."

N. J. Laski Q.C. and *C. N. Glidewell* for the defendant company. This problem has been approached by those who advise the defendants in the spirit of Lord Sumner's speech in *Levene* v. *Inland Revenue Commissioners* [3]: "It is trite law that "His Majesty's subjects are free, if they can, to make their "own arrangements, so that their cases may fall outside the "scope of the taxing Acts." That would refer to any Act.

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[3] [1928] A.C. 217, 227; 44 T.L.R. 374.

"They incur no legal penalties and, strictly speaking, no moral "censure if, having considered the lines drawn by the legislature "for the imposition of taxes, they make it their business to "walk outside them." In exactly the same way this matter is approached here.

The document, which is throughout termed a rental agreement and uses the word "rent" with great deliberation, advertises in clause 11 that there is legislation preventing the exercise of an option in terms of hire-purchase.

With regard to the definition of "hire-purchase agreement," it is easy to understand what is meant there by the words "will" and "may." This definition is referring to absolute and existent right simpliciter and not to something which is contingent and outside the document itself. "May," for instance, is easily explained. There is an option in a hire-purchase agreement and if that option is not exercised no property passes. If, on the other hand, the option is exercised, the property passes; so the property may pass or it may not pass. "Will" is the word of inevitability. Where an agreement provides, without giving an option involving the payment of a further sum, large or small, that the property passes when 24 hire periods have expired, then if there has been regular payment the property passes without the further exercise of an option.

There is here no right of any kind. Suppose 24 months had passed and the situation was as it is today and the enactment of the necessary legislation had not taken place, the person who signed this agreement would not have any right to exercise an option. It would not exist. This agreement is entirely outside the realm of the agreements being contemplated in the definition section of the Hire-Purchase Act, 1938. It is clear that the draftsman of section 21, and Parliament when it passed that section, was looking at an in præsenti right and not a speculative in futuro right which, it is submitted, in this agreement does not exist.

This cannot be an illegal document merely because it seeks to make provision for something which may happen if the necessary legislation is passed. It underlines and dots the i's and crosses the t's of its own legality by saying that.

Leigh in reply. Supposing, as the defendant company apparently anticipated when they drew this agreement, that legislation were passed which would enable the property thereafter to be handed over and an agreement then entered into: in that case the property would pass under this agreement, but the agreement would still have been illegal because at the time it was made the Order said that one must not enter into an agreement for over 18 months. Supposing legislation repealing that provision were enacted in six months' time, that would not make the original agreement legal. The defendants are looking at legality at the time of the passing of the property, whereas one should look at legality at the time of entering into the agreement. Equally, an illegal agreement entered into before that amending legislation is passed, unless there is some special proviso, remains illegal because it is contemplating that in future there may be legislation passed which will enable property to pass. Unless that is contemplated, then it is clear the property would pass under this agreement. For that reason again, it is submitted, this agreement is clearly illegal.

Jones J. Members of the jury: Hire-purchase agreements take various forms, and the usual one is that of hire with an option to purchase. It has been considered advisable that certain restrictions be placed upon hire-purchase agreements. First, in 1938, an Act of Parliament was passed which imposed certain restrictions, and since then various orders have been passed, in particular the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952. [His Lordship read article 1 of the Order and the Second Schedule, and continued:] The document before you does not comply with several of the requirements of the Second Schedule to the Order, and the defendants say that it does not comply because it is not a hire-purchase agreement. The prosecution, on the other hand, say that it is a hire-purchase agreement, and therefore it ought to comply. Therefore, what has to be decided is a pure question of law, whether this document is a hire-purchase agreement or not.

No cash price has been stated in this document, nor has the second requirement about the payment of 33⅓ per cent. been carried out; nor is the period during which the instalments may be paid limited to 18 months, and therefore if this document is a hire-purchase agreement it is entirely in breach of this Order, and the defendants are liable to be convicted.

Before I can allow you to come to the conclusion, as a matter of fact, that they had been guilty of a breach of this Order, I have to decide and direct you on the point whether this is a hire-purchase agreement or not.

That question is not an easy one, and turns on the construction of clause 11—whether that clause gives an option or whether it is so restricted that no option to purchase is given. It provides: "If this agreement shall continue in force for the period "of two years from the date hereof then the company shall "afford the customer the three alternatives following:—(*a*) Subject to the enactment of the necessary legislation, to purchase "the above-mentioned [goods] for the sum of one shilling. . . ."

It must be obvious to you that if "subject to the enactment "of the necessary legislation" is left out, leaving only the words "to purchase the above-mentioned [goods] for the sum of one "shilling," it would be a clear option and the document would be a hire-purchase agreement, and ought to comply with this Order. What is the meaning of those words, "subject to the "enactment of the necessary legislation"? The question is, was the hirer given an option within the meaning of the definition in the Hire-Purchase Act, 1938, s. 21. In that Act, "hire-"purchase agreement" is defined as an agreement for the bailment of goods under which the bailee may buy the goods. It cannot be suggested by Mr. Leigh, for the Crown, that this is an agreement under which the bailee may buy the goods, but what he does say is that it is an agreement under which the property in the goods "will or may pass" to the bailee. He agrees (and undoubtedly it is the case) that the time when one has to judge whether under the agreement the goods will or may pass is the time when the agreement is entered into, and that is the question which has to be decided.

The conclusion to which I have come is that, to make it a hire-purchase agreement, the hirer should either have been given a right to buy the goods if he wanted to, or there should be such a provision that if the goods might pass to the bailee they might do so only by virtue of some right which has been conferred on him by this agreement. In my view, no such right has been conferred on him, because that right would have been acquired only if this new legislation were passed, and there is no certainty whatever whether the new legislation would be passed, or when it would be passed. In view of that, it seems to me that it cannot be said that this is an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee.

In those circumstances, members of the jury, I have come to the conclusion, as a matter of law, that it is not a hire-purchase agreement and, therefore, the defendants have not

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committed any breach of the Order of 1952. Therefore, on my direction, will you find a verdict of Not Guilty?

Verdict: Not Guilty.

Solicitors: *Solicitor for the Board of Trade; David Blank, Alexander & Co., Manchester.*

1953
June 10.

McNair J.

C. A.

1954
Jan. 19.

Somervell and Birkett L.JJ., and Upjohn J.

NOLAN *v.* C. & C. MARSHALL LD.

Legal Aid—Costs—Means of aided person—Whether damages awarded to him to be taken into consideration—Payment into court of sum greater than that awarded—Plaintiff legally aided, nil contribution—Usual rule as to costs not affected by Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*e*), 4 (3).

In an action by a plaintiff, whose disposable capital was, according to his legal aid certificate, nil, and whose contribution towards his costs was also assessed at nil, the defendants had paid into court a sum greater than that awarded under the judgment:—

Held (*per* McNair J.), that, as neither the Legal Aid and Advice Act, 1949, nor the regulations thereunder, dealt specifically with the question of payment into court, Parliament in enacting section 2 (2) (*e*) of that Act[1] could not be assumed to have intended that defendants should be deprived of their right to pay into court with the resulting benefit as to costs.

On appeal, the award was increased to exceed the sum paid into court by the defendants, but the court approved the principle laid down by the trial judge that in considering the means of an aided plaintiff, in relation to the question of costs, the court could take into consideration damages which had been awarded to him.

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

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[1] Legal Aid and Advice Act, 1949, s. 2 (2): "Where a person receives "legal aid in connexion with any "proceedings— . . .

"(*e*) his liability by virtue of an "order for costs made against him "with respect to the proceedings shall "not exceed the amount (if any) "which is a reasonable one for him "to pay having regard to all the cir- "cumstances, including the means of "all the parties and their conduct "in connexion with the dispute."

S. 3 (4): "Except so far as "regulations otherwise provide, any "sums remaining unpaid on account "of a person's contribution to the "legal aid fund in respect of any "proceedings and, if the total contri- "bution is less than the net liability "of that fund on his account, a sum "equal to the deficiency shall be a "first charge for the benefit of the "legal aid fund on any property "(wherever situate) which is re- "covered or preserved for him in the "proceedings."

At the conclusion of an action for damages for personal injury a sum of £504 1s. 11d. was awarded to the plaintiff. The defendants were then stated to have paid into court a sum of £763 on May 13, 1952. The plaintiff, who was 16 years old at the time of the accident and 18 years old at the date of the hearing, had been granted a certificate under the Legal Aid and Advice Act, 1949, for the purpose of the proceedings. The certificate showed his disposable capital as nil and his contribution towards costs had also been assessed at nil.

The question was raised whether the ordinary rule as to costs in such circumstances was applicable notwithstanding that this was a legal aid case.

Montague Waters for the plaintiff.
John Thompson for the defendants.

The argument sufficiently appears in the judgment.

McNAIR J. If this had not been a legal aid case I should have thought that it was a proper one in which to apply the normal rule, namely, that the plaintiff would recover costs up to the date of payment in, and the defendants their costs since the date of payment in until judgment; and that if on setting off those costs the one against the other there was found to be a balance in favour of the defendants, that balance would be deducted from the amount of the damages awarded, and that only the balance would be paid out to the plaintiff in satisfaction of the judgment. It was argued by Mr. Montague Waters, however, that since this is a legal aid case, a different order should be made.

[His Lordship stated the facts, read section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949, and continued:] In the circumstances it is said that the court, in considering the plaintiff's liability to pay or to bear costs, ought, under section 2 (2) (*e*) of the Legal Aid and Advice Act, to make such order as secures that his liability does not exceed the amount, if any, which is a reasonable one for him to pay, having regard to all the circumstances, including the means of all the parties and their conduct in connexion with the dispute.

I agree that that is a direction which the court ought to accept. It was said, too, that there had been no misconduct by the plaintiff in this case and that the only relevant conduct on his part was that he did not take out of court this sum of £763 at or soon after the date of payment in, and I was asked to infer that that was on the advice of his legal advisers.

The conduct of the defendants, it was admitted, had been impeccable, and nothing can be said against them for anything they have done in the action.

Certain figures were put before me by way of illustration to persuade me to make an order in this case other than that which I would make in the ordinary case. The figures given were these: the plaintiff's costs up to the date of payment in, £20, after that date £150; the defendants' costs after payment in, £130; so that on those figures there would be a balance in respect of costs in the defendants' favour of £110. If that is deducted from the £500 awarded, there will be £390 to go into the legal aid fund. It was further argued that of that £390 which would go into the legal aid fund £170 would be retained by the legal aid authorities to meet the plaintiff's costs, leaving him merely a balance of £220.

I am not concerned at this stage to consider whether the legal aid authorities would be entitled to deduct £170 in a case where the legally aided plaintiff's contribution has been assessed at nil. It may be so, but there is clearly on the wording of section 3 (4) of the Act an argument to be founded to the contrary.

If I accede to the plaintiff's submission in this case it would seem to me that I would be depriving the defendants of all the benefit which the Rules of Court afford to a defendant to pay into court at an early stage in the action, and in that way, in effect, to buy off the litigation. As there is nothing in the Legal Aid and Advice Act or the regulations thereunder which deals specifically with the question of payment into court, I must assume that Parliament has not had in mind that, in the ordinary case, a defendant should, by virtue of the legal aid provisions, be deprived of that right to pay into court with the usual result.

I am fully conscious that the result of making the order which I propose to make will be, in effect, that the plaintiff will receive into his own pocket an inadequate sum, or a lesser sum than that which I have considered proper compensation for his injuries. That result, however, follows from the fact that he, either on advice or not—it is immaterial—did in fact refuse an offer of £763 in May, 1952.

If, in those circumstances, I make the ordinary order as indicated, I shall not be making the plaintiff liable for any sum which exceeds the amount which is reasonable for him to pay having regard to all the circumstances including the means of the parties and their conduct in connexion with the dispute.

Judgment accordingly.

The plaintiff appealed, contending, inter alia, that the sum awarded was inadequate and that, in relation to the question of costs, the trial judge in considering the means of a legally aided person ought not to have taken into account the damages which had been awarded to him. The appeal is here reported only on the latter point.

F. W. Beney Q.C. and *Montague Waters* for the plaintiff.
John Thompson for the defendants.

SOMERVELL L.J., having stated the facts and announced that the sum awarded would be increased, continued: Counsel for the plaintiff argued that the judge, having decided that there were costs which the plaintiff ought to pay, in considering what sum it was reasonable for the plaintiff, as a legally aided person, to pay, took into account the fact that he was awarding the sum of £500 in respect of the plaintiff's claim. We were referred to section 4 (3) of the Legal Aid and Advice Act. That section provides for the extent of a person's contribution, which is based on an assessment of his disposable capital and income. It contains an express provision that "The regulations shall include "provision for securing that the resources of a person seeking or "receiving legal aid shall be treated as not including the subject "matter of the dispute." But when the judge expressed his view upon the matter, it had passed that stage: the dispute had been decided and he had awarded the sum of £500. I can find nothing either in the Act or in the regulations which would go to show that the judge was wrong in taking that fact into account in the way in which he did. Indeed, Mr. Waters was inclined to admit that it was hard to argue against it. For these reasons I think that the appeal should be allowed in the sense which I have indicated.

BIRKETT L.J. I am of the same opinion. A point upon which I desire to say a word is the matter which arises under section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949. In that section it is clear that what the court is considering is the moment of time when damages are being assessed, whereas

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in section 4 (3) the moment of time which is then being considered is that of the assessment of the man's contribution. From that assessment is to be excluded any prospective gain from any claim which he may have. But in considering costs under section 2 (2) (*e*), where the words are "shall not "exceed the amount . . . which is a reasonable one for him to pay "having regard to all the circumstances, including the means of "all the parties. . . ." I think that if a man has recovered £500 or £1,000 or £10,000, whatever it might be, that is certainly one of the circumstances of the case. It is certainly a matter of which the statute enjoins one to take account, and I think that it ought to be brought into account. For these reasons I would allow the appeal and alter the amount from £500 to £1,200.

UPJOHN J. I agree so completely with the two judgments which have been delivered that I do not think I can usefully add anything.

Appeal allowed. Judgment for the plaintiff for £1,204 with costs.

Solicitors: *Leonard Kasler; Watson, Sons & Room.*

A. W. G.

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Somervell, Birkett and Romer L.JJ.

REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL. *Ex parte* TECHNALOY LD.

Trade Dispute — Industrial Disputes Tribunal — Jurisdiction — Report by union on behalf of workmen—Reference of matter to tribunal by Minister as a "dispute"—Whether employer bound by national agreement as to increase of wages and holidays — Employers not members of federation — Distinction between "dispute" and "issue"—Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *arts.* 1 *and* 2.

Representatives of employers and workmen engaged in the iron foundry trade made an agreement whereby a rise was to be given to all workers in the union by employers who were members of the employers' federation. The applicant company, not being a member of the federation, refused to implement this agreement on the ground that they were already paying their employees a wage which was at least equal to, and in some cases in excess of, the wage which other employers in the same trade were paying even after giving the rise. Acting on the report of the area trade union the Minister referred the matter to the Industrial Disputes Tribunal as a dispute.

On the application of the company a Divisional Court held that the question whether an employer should be required to observe the agreed terms of employment was not a "dispute" within the meaning of article 1 of the Industrial Disputes Order, 1951,[1] but an "issue" under article 2, and an order of prohibition was granted. On appeal by the union on behalf of its members in the employment of the company:—

Held, that the controversy, which was concerned with the terms of employment of the workmen, came within the definition of "dispute" in article 12 (1) of the Order; that the matter, therefore, was referable to the tribunal as a dispute under article 1; and that the order of prohibition must be quashed.

Held, further, that "issue," as defined in article 2, was primarily concerned with whether a particular employer should be bound to accept a general code of conditions of employment established by negotiation or arbitration between representative organizations of employers and trade unions and covering the whole of a particular industry.

Per Romer L.J. While I accept the view as to the primary concern of article 2, I nevertheless think that it does not prevent the partial non-observance of recognized terms and conditions from constituting an "issue."

Decision of Divisional Court [1953] 1 W.L.R. 1418; [1953] 2 All E.R. 1338 reversed.

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[1] Industrial Disputes Order, 1951, art. 1: "Where a dispute exists "in a trade or industry or sec-"tion of a trade or industry or in "an undertaking and that dispute is "reported to the Minister in accord-"ance with this Order by—(i) an "organization of employers, on behalf "of employers who are parties to the "dispute; (ii) an employer, where "the dispute is between that em-"ployer and workers in the employ-"ment of that employer; or (iii) a "trade union, on behalf of workers "who are parties to the dispute . . . "that dispute shall be dealt with in "accordance with the subsequent "provisions of this Order."

Art. 2: "Where—(*a*) in any trade "or industry or section of trade or "industry in any district terms and "conditions of employment are estab-"lished which have been settled by "machinery of negotiation or arbi-"tration to which the parties are "organizations of employers and "trade unions representative respec-"tively of substantial proportions of "the employers and workers engaged "in that trade or industry or section "of trade or industry in that district "(hereinafter referred to as 'recog-"'nized terms and conditions'); and "(*b*) an issue as to whether an em-"ployer in that district should "observe the recognized terms and "conditions (hereinafter referred to "as 'an issue') is reported to the "Minister in accordance with this "order by an organization of em-"ployers or a trade union; and (*c*) "the Minister is of opinion that the "organization of employers or trade "union reporting the issue habitually "takes part in the settlement of "terms and conditions of employment "in the trade or industry or section "of trade or industry concerned; that "issue shall be dealt with in accord-"ance with the subsequent provisions "of this Order."

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APPEAL from Divisional Court.

In November, 1951, the representatives of employers and of workmen engaged in the iron foundry trade entered into an agreement whereby a rise of 3d. per hour was granted to all members of the trade union by employers who were members of the employers' federation. The agreement also concerned the calculation of the length of holidays with pay. Technaloy Ld., not being members of the employers' federation, refused to give their workmen who were trade union members this rise, as they alleged that they were already paying a wage which was at least equal to, and in some cases in excess of, the wage which other iron foundries were paying, even with the addition of the rise.

On December 4, 1952, the Minister of Labour referred to the Industrial Disputes Tribunal, on the report of the area trade union, on behalf of members of the union, a dispute, described in the following words: " Employers: Technaloy Ld., Iron Founders. " Workers: Members of the Amalgamated Union of Foundry " Workers of Great Britain and Ireland in the employment " of the said employers. Description of the dispute: The " dispute arises out of a claim made by the said workers " that the company should implement the agreement between " the Engineering and Allied Employers' National Federa- " tion and the Confederation of Shipbuilding and Engineering " Unions dated November 29, 1951, relating to wages and holidays " with pay . . . The dispute was reported to the Minister on " November 20, 1952, by the Amalgamated Union of Foundry " Workers of Great Britain and Ireland on behalf of the workers."

The tribunal heard the case and made an award, which was later quashed by the Divisional Court as bad on its face, in that it purported to give an increase of wages retrospective beyond the date allowed by the Industrial Disputes Order, 1951. On the tribunal giving notice to the parties of their intention to start again on the same reference, Technaloy Ld. applied for and obtained from a Divisional Court an order of prohibition, from which the present appeal was brought on behalf of the workers.

D. N. Pritt Q.C. and *D. J. Turner-Samuels* for the Amalgamated Union of Foundry Workers. The ground on which the employer asked for an order of prohibition was that the Minister had no power to refer the report to the tribunal because there was no dispute existing between the employer and his workmen, or any of them. There may arise a question of law, but the principal

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ground on which the Divisional Court granted the order of prohibition was that the alleged dispute was not a "dispute" under article 1 of the Industrial Disputes Order, 1951, but an "issue" under article 2 (*b*) of that Order. Even if the difference between the employer and workmen is an issue, it also has all the qualifications of a dispute, and there is nothing in the Order to suggest that "dispute" and "issue" are mutually exclusive terms. This is plainly a difference between an employer and a number of the men in his employment and it is really a dispute in the sense that the workmen claim to be entitled to extra pay and another day's paid holiday in implementation of a national agreement reached between the employers' federation and the trade unions, and the employer refuses to implement that agreement. All the qualifications of a dispute are therefore present.

[Somervell L.J. It is to be noticed that if it is an "issue" a trade union can only set the matter in motion if it habitually takes part in the settlement of terms and conditions of employment in the trade or industry or section of trade or industry concerned.]

It is submitted that there is not sufficient shown in this case under which the Minister could refer an "issue." All the conditions exist for referring the matter as a "dispute," and this court is asked to quash the order of prohibition. When considering what is a "dispute" and what is an "issue" it will be seen how wide is the former and how narrow is the latter. *Rex* v. *National Arbitration Tribunal, ex parte Midgley Harmer* [2] was decided under the old Order, of which the form was different but the effect the same. A comparison of the two Orders shows how the legislative mind moved and the present Order came to be drafted. There had to be a new definition of "dispute," and it is significant that the definition clause, article 12, starts off with a negative and then says that "dispute" means "any dispute between an "employer and workmen . . . connected with the terms of the "employment or with the conditions of labour of any of those "workmen; 'issue' has the meaning assigned to it in article 2 "of this Order." If it had been intended that "dispute" and "issue" should be mutually exclusive terms it should have been made clear. The difference between a "dispute" and an "issue" is that a dispute of the kind in question affects only the parties to the dispute, whereas an issue goes much wider and affects the future. The present dispute is an isolated one, and

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[2] [1947] 1 All E.R. 196.

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the settlement of it will be limited in its effect to the employer and some of the workmen employed by him. All that this group of workmen is asking is that the employer shall implement the recognized conditions of the industry in which they are employed. That is the real position. [*Rex* v. *National Arbitration Tribunal, ex parte South Shields Corporation* [3] was also referred to.]

S. B. R. Cooke for the Ministry of Labour. The sole interest of the Minister is in the administration of the Order. The cases may be divided into three categories: (1) where there is a dispute only; (2) where there is an issue only; (3) where the subject-matter between the parties really partakes of the nature both of a dispute and an issue. The first is a simple case where workmen in a particular employment are saying to their employer "we want so much more." There are no recognized terms in that industry, and so no question of the application of a national agreement arises. The second is a case where an employer and his workmen are in fact in agreement in observing terms and conditions some or all of which are not national conditions. In those circumstances article 2 provides that an organization of employers or a trade union, acting as intervener, may bring the matter before the tribunal and ask for an award that the employer shall observe the national terms of agreement. In practice the tribunal under article 9 may come to the conclusion that the terms and conditions in operation are as fair as the national conditions, and may make no order. The third is a case which on the finding of the Divisional Court is the present case. It is submitted that an "issue" is where there are recognized national conditions and the complaint is that the employer is not observing them. If it is a question of the meaning of the terms and conditions it is a "dispute"; but if it is a question whether the employer shall observe the terms and conditions it is an "issue." Where the workmen are contented there cannot be a "dispute" but only an "issue." When it is a question whether the employers are observing the national agreement the question whether it is a "dispute" or an "issue" depends upon how the matter is put forward. In effect, the parties themselves decide under which definition they will bring forward the report. The employer cannot report an issue and therefore the case can be reported as both a dispute and an issue. [*Hulland* v. *William Sanders & Son* [4] was referred to.]

F. W. Beney Q.C. and *Neil Lawson* for Technaloy Ld. There are not three categories, but only two. There is no mixed category. The power of the Minister depends on what is reported to him. He refers a matter according to how it is reported to him. The union was not saying that certain of its members were employed by Technaloy Ld. and on their behalf it was desired to report a dispute. It was not a report made by the union under article 1, and therefore it did not give the Minister power to deal with the matter as a "dispute," but it did give him power to deal with it as an "issue." By paragraph 3 of article 8 disputes have to be referred within a certain number of days. Under article 9, which deals with issues, there is no time limit. It is submitted that the Minister cannot alter the character of the report. The report settles finally the branch of the Order under which the Minister is to exercise his jurisdiction.

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[3] [1952] 1 K.B. 46; [1951] 2 T.L.R. 791; [1951] 2 All E.R. 828.

[4] [1945] K.B. 78, 86; 61 T.L.R. 83; [1944] 2 All E.R. 568.

[BIRKETT L.J. A union can act only for its members. Would it be within the power of the Minister to assume that it is reporting on behalf of the workmen?]

I do not think so. He must assume, in the circumstances, that it is an issue under article 2 which is reported. Article 2 must be read in conjunction with article 9 (2), and paragraph (2) is neutral as to whether article 2 is confined to the terms and conditions of employment as a whole. In article 9 (2) the tribunal is given directions as to what it can take into account in coming to a decision on the issue. The words "recognized terms and "conditions applicable to the case" are consistent with the view that there are many terms and conditions, and that there are some which are not applicable to the particular works. The nature of the employer's works may exclude certain conditions. It is submitted that it is intended to cover a case in which all the recognized terms and conditions may not be observed because terms not less favourable are being observed. What the report by the union is seeking to say is that this company is not carrying out an agreement which has been nationally agreed, and that is the very topic which article 2 is intended to cover. If the workmen were saying "you are not carrying out the terms of the "agreement," and the employer was replying "I am carrying "them out," that would be a dispute; but where a union asks for a decision whether a particular employer should carry out an agreement and is doing so, the Minister has no power to refer a dispute, because there is no dispute, but only an issue.

Pritt Q.C. in reply. Mr. Cooke's three categories are accepted, though I would prefer to substitute "or" for "and" in category 3; the report sent to the Minister may be such that it can

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be treated either as a dispute or issue, and he can then decide how he will refer it. A dispute arising on certain facts or matters can give rise to an issue. There may be a case where it would be right for a report to be made which would lead to adjudication on a dispute "or" an issue. The Minister alone can give jurisdiction to the tribunal and he must hold himself at liberty to say in some cases "here is a union or an employers' federation asking "me to refer as a dispute what I think is an issue, or as an issue "what I think is a dispute."

Cur. adv. vult.

Somervell L.J. This case turns on the construction of the Industrial Disputes Order, 1951. Article 1 is headed: "Reporting "of disputes." Article 2 is headed: "Reporting of issues concerning recognized terms and conditions of employment." Matters arising under either article can be referred by the Minister of Labour to the Industrial Disputes Tribunal. In the present case the tribunal are proposing to deal with a matter referred to them by the Minister as a "dispute." The Divisional Court, at the instance of the applicant, Technaloy Ld., have issued an order of prohibition directed to the tribunal on the ground that the matter is not a dispute within the meaning of the Order but an "issue." The respondents, the Amalgamated Union of Foundry Workers, appeal, and the Minister of Labour, who is rightly a party, appeared before us and was represented by Mr. Cooke.

[His Lordship read the relevant parts of the two articles, and continued:] Taking article 2 first, and assuming a trade or industry in which terms and conditions of employment have been established within the meaning of the article, A is an employer who is not a member of the organization of employers which has negotiated the terms and conditions and is not therefore bound by them as such. It seems to me clear that the question whether he should be bound by them as such is the matter with which article 2 primarily deals. Under the later articles of the Order the tribunal have power to order that A shall be so bound in so far as the terms and conditions are applicable to him. One of the grounds upon which the tribunal can refuse to make an order is that the terms actually observed by employer A are not less favourable than the recognized terms. If the tribunal make an award it can substitute for the recognized terms terms not less favourable. These, I think, all point to the code as a whole.

The principal Order which this Order revoked and displaced was

No. 1305 of 1940. Part I concerned disputes on similar lines to article 1 of the present Order. Part III is headed: "Recognized "terms and conditions of employment." Article 5 (1) of that Part reads as follows: "Where in any trade or industry in any "district there are in force terms and conditions of employment "which have been settled by machinery of negotiation or arbitration to which the parties are organizations of employers and "trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or "industry in that district (hereinafter referred to as 'recognized "'terms and conditions') all employers in that trade or industry "in that district shall observe the recognized terms and conditions "or such terms and conditions of employment as are not less "favourable than the recognized terms and conditions." There are later provisions as to what could be done if an employer failed to observe the terms, which were considered in *Hulland* v. *William Sanders & Son.*[1] Broadly speaking, what was mandatory under the old Order now goes as an issue to the tribunal. It is reasonable to regard article 2 as replacing article 5 of the earlier Order, and the latter was concerned with the terms as a whole. It was, I think, agreed that the question whether an employer, admittedly a party to the recognized terms and conditions, was carrying them out would be a dispute. The recognized terms and conditions like ordinary contracts would give rise to questions of construction and application.

In the present case the union reported to the Ministry the failure of Technaloy to implement an agreement between the Engineering and Allied Employers' National Federation and the Confederation of Shipbuilding and Engineering Unions, dated November 29, 1951. That agreement provides for an increase of wages and for six bank and other holidays in addition to 10 days' holiday. Technaloy were not a member of the federation. The court, in the course of the hearing, asked for and received further information as to the terms and conditions apart from this agreement. There are a large number of national agreements between the federation and the confederation dealing with industrial relations, working conditions, wages and other terms, and conditions of employment. There is a handbook of over 600 pages. Technaloy is not a member of the federation and the union is not claiming or suggesting that the company should be so bound. The difference is confined to the increase in pay and the holidays.

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[1] [1945] K.B. 78.

The applicants alleged that there was no dispute with their workmen, which is a condition precedent for a dispute though not for an issue. There were conflicting affidavits, but the Divisional Court held that there was such a dispute at the material time, and I agree. This, of course, does not on any view conclude the matter. I have said that there might be an issue whether employer A should be bound by the recognized terms although his actual employees were perfectly content. On the other hand, in the more usual case the employees would, through the union, be raising the "issue."

Although I have come to the conclusion that this was a dispute and should be allowed to go forward as such, the trouble has arisen in part from the form in which it was reported. This form persists to some extent in the formulation of the dispute in the reference by the Minister to the tribunal. "The "dispute arises out of a claim made by the said workers that "the company should implement the agreement between the "Engineering and Allied Employers' National Federation and "the Confederation of Shipbuilding and Engineering Unions "dated November 29, 1951, relating to wages and holidays with "pay." That is the reference. The implementation of national agreements echoes the wording of article 2 (*b*) and suggests an issue. If one assumes a simple case, where there is added to a large body of agreed terms and conditions a one-line agreement to the effect that the working week should be reduced to 44 hours, a company, not bound by the terms and conditions, continues to work a 46-hour week and the employees complain to their union. The dispute is clearly, in my view, the length of the working week in that particular factory. The national agreement is prima facie relevant evidence. The union would submit that these employers could do what the federated employers had agreed to. The employers might have an answer based on special circumstances or possibly other conditions more favourable than under the national agreements. If in that case the matter had been put forward as a demand that the employers should implement this agreement this would not, in my opinion, have made it an "issue" or altered its character.

In other words, the question whether an employer not bound by the recognized terms should in fact carry out one or more of these terms but not the terms as a whole (as far as applicable) is, I think, outside article 2. What I have described as the primary purpose of article 2 is, in my opinion, the only purpose, and I imply after the word "conditions" in article 2 (*b*) the words "as a whole" or some such phrase. This is, I think, borne out by the words of article 9 (2). The wording there indicates that the issue is concerned with the code as a whole.

I thought it convenient to consider first the question of construction. In fact, the matter as so referred came on originally before the tribunal, who made an award in the following terms: "The tribunal have given careful consideration to the above-"mentioned statements and submissions made on behalf of the "parties. They find, and so award, that the company shall apply "to the workers concerned the provisions of the agreement "between the Engineering and Allied Employers' National "Federation and the Confederation of Shipbuilding and Engineer-"ing Unions dated November 29, 1951, relating to wages and "holidays, with effect as from the date provided therein, namely, "as from the beginning of the first full pay period following "November 23, 1951."

The applicants applied to set this aside on the ground that the tribunal had no jurisdiction to make the award effective as from the dates set out. No one sought to uphold the award as so made. The tribunal then gave notice to the parties that they proposed to rehear the reference, and it is in respect of that rehearing that the writ of prohibition is sought. I think that the rehearing should be allowed to proceed, but there is one matter on which I should like to add a comment. Lord Goddard C.J., in his judgment, said this [2]: "However, that is a matter "for the tribunal, and it does appear from the affidavit of the "managing director of the employers that when they were before "the tribunal in January of this year, the tribunal—and this is "not disputed—refused to go into the question as to the amount "of wages and wage rates and increases paid and granted by "the company, stating that the only question to be determined "was whether or not the company should be bound by the "agreement. If that was the question, it was an issue, and it "ought to be determined according to the provisions of article 9 "of this Order." Before us this was disputed, and the tribunal's award on the face of it states that they had given consideration to the matters advanced by the applicants, which include a reference to their own conditions of employment. It may well be, however, that the infelicities to which I have referred in the wording led to a misunderstanding. Evidence about the wages the applicants pay to the claimants must be *relevant* in considering whether there should be an increase. It is not conclusive. As Mr. Pritt submitted, it may be reasonable that there should be an increase even if the level of wages was higher in the applicants' factory than generally, but if it was excluded it was, in my opinion, wrongly excluded. The same principle would apply as to holidays.

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[2] [1953] 1 W.L.R. 1418, 1423.

For these reasons I would allow the appeal. I would also like to suggest that the wording of the Order might well be made clearer than it is. It would be unfortunate if it remained a happy hunting ground for prerogative writs. The fact that my brother Romer takes a somewhat different view of its construction reinforces this suggestion.

BIRKETT L.J. On October 8, 1953, on a motion made on behalf of a company called Technaloy Ld., the Divisional Court made an order of prohibition directed to the Industrial Disputes Tribunal prohibiting them from proceeding any further with a reference which the Ministry of Labour and National Service had made to them on December 4, 1952. The trade union, the Amalgamated Union of Foundry Workers of Great Britain and Ireland, appeals against that decision. The main point in the appeal turns on the construction of the Industrial Disputes Order, 1951, which came into operation on August 14, 1951, as it is to be applied to the facts of this case.

Technaloy Ld. is a company carrying on business as importers at Stocklake, Aylesbury, and employs about a dozen men. The company is not, and never has been, a member of the Engineering and Allied Employers' National Federation, but the Amalgamated Union of Foundry Workers of Great Britain and Ireland is a member of the Confederation of Shipbuilding and Engineering Unions. On November 29, 1951, an agreement was made between the federation and the confederation in which a general increase of wages of 11s. per week was granted to all adult male workers employed in the engineering industry, and each manual worker was to receive 16 days' holiday each year, which was to be made up of 10 days' annual summer holiday and 6 bank or other paid holidays according to a former agreement of April 3, 1946.

The trouble (to use a neutral expression for the moment) arises in this way. Technaloy Ld. employed some men who were members of the Amalgamated Union of Foundry Workers, and an official of the union, Mr. Cornwell, called on Mr. Murad, the managing director of Technaloy Ld., in April, 1952, and asked him whether the company proposed to pay the increase laid down in the agreement of 1951. Mr. Murad said that the company was not bound by the agreement as they were not members of the Employers' Federation, and further that the company was paying wages in excess of the wages paid generally in the trade. In September, 1952, Mr. Cornwell saw Mr. Murad again and asked if the company was granting a fortnight's holiday with pay to the workmen, and Mr. Murad said that the terms and conditions of employment of the workmen were in no way less favourable than any term provided by the agreement of November, 1951, and that their workmen were all content with the conditions of service.

The Industrial Disputes Order of 1951 is designed to deal with differences which arise in industry between employers and workers; and Mr. Cornwell, the divisional organizer of the Amalgamated Union of Foundry Workers, resorted to it, and on September 11, 1952, he reported to the Industrial Relations Department that a " dispute " existed between the union and Technaloy Ld. The dispute, he said, was the failure of Technaloy Ld. to implement the terms of the agreement of November 29, 1951. Further correspondence followed between the general secretary of the union and Technaloy Ld., and between the Industrial Relations Section of the Ministry of Labour and National Service and Technaloy Ld. It would appear that in some of the letters the word " dispute " was used, and in some letters the word " issue " was used; but no real advantage would be gained by reading at length from that correspondence.

As a result of all this, the Ministry of Labour and National Service referred the matter to the Industrial Disputes Tribunal on December 9, 1952. The parties are there described, with the description of the dispute, and the notice on the report that may be seen in the bundle of papers with which we were supplied.

The Industrial Disputes Tribunal heard the parties and made its award on January 8, 1953. That award came before the Divisional Court on certiorari and was quashed because the award was bad on its face. After the decision of the Divisional Court, the tribunal gave notice to the parties that they proposed to proceed afresh with the reference, and the order for prohibition, which is the subject-matter of this appeal, was made by the Divisional Court at the instance of the employers, Technaloy Ld. The ground on which the Divisional Court acted was that the Ministry had referred the matter to the tribunal as a " dispute," whereas the matter should have been referred to the tribunal as an "issue."

The Industrial Disputes Order of 1951 revoked the Conditions of Employment and National Arbitration Orders of 1940 to 1950, but it is plain from the provisions of these Orders that their purpose was to prevent work being interrupted by trade disputes, and the National Arbitration Tribunal set up by the Order of 1940, No. 1305, was empowered to deal with all trade disputes. But the Order of 1951 made a distinction between "disputes" and "issues." Part I of the Order is headed: "Reporting of "Disputes and Issues," and article 1 of Part I is concerned with reporting of disputes. A dispute is defined in clause 12, and the material words for the purpose of this appeal are: "dispute ". . . means any dispute between an employer and workmen in " the employment of that employer connected with the terms of " the employment . . . or with the conditions of labour of any of " those workmen."

If such a dispute is reported to the Ministry by a trade union on behalf of workers who are parties to the dispute, then the Minister must consider the matter set out in article 1 (*a*) and (*b*) of the Order and consider the dispute in accordance with the other provisions of the Order. In the present case the Minister referred the dispute to the tribunal under article 8 of the Order.

But article 2 of the Order is headed: "Reporting of issues " concerning recognized terms and conditions of employment." The issue, as distinct from a "dispute," has the meaning assigned to it in that article. The Divisional Court has said that the controversy between Technaloy Ld. and the trade union in this case was an "issue" and not a "dispute" within the meaning of the Order, the "issue" being whether Technaloy Ld. should observe the terms and conditions of the agreement of November 29, 1951. These terms and conditions, it is said, come within article 2 (*a*) of the Order, and that the Minister presumably was satisfied that the conditions of article 2 (*c*) were fulfilled. Then follows article 9 (2) of the Order, which I will not trouble to read at length.

It was submitted on behalf of Technaloy Ld. that the Divisional Court's decision was right, inasmuch as the matters in controversy were an "issue" and not a "dispute" within the meaning of the Order, and it was said: (a) that the reporting of a "dispute" may be made by a trade union on behalf of workers who are parties to the dispute, whereas the reporting of an "issue" may be made by a trade union. The report of September 11, 1952, used the words: " . . . a dispute exists as between "this union and the above firm," although the Minister, in referring the question to the tribunal, had used the words: "the "dispute arises out of a claim made by the said workers," and "the dispute as reported to the Minister on November 20, 1952, "by the Amalgamated Union of Foundry Workers of Great "Britain and Ireland on behalf of the workers"; (b) that all the 12 men employed by Technaloy Ld. on June 29, 1953, had signed a document stating that there was no dispute with the employers, and that they were all satisfied with the terms and conditions of their employment.

I am of opinion that neither of these two points are of any assistance in deciding the question in this appeal. Apart from the fact that the affidavit of Mr. Cornwell, the divisional organizer of the union, asserts that he was acting on behalf of the men at their direct request, and that of the 12 men who signed the document on June 29, 1953, nine are not involved in the controversy, I think it is plain that the report was made by the union on behalf of the workers, and that the question in this appeal is not to be decided by the expression of views by workers who happened to be employed by the company at a particular date. The real point to be decided is whether the facts in the case show the controversy to be an "issue" or a dispute within the meaning of the Order. The agreement of November 29, 1951, was concerned with two matters only—the 11s. increase and the question of holidays. In asking the employers to fulfil the terms of this agreement the union was asking for the increase in wages and for the additional holiday; and in refusing to fulfil the terms of this agreement, the employers were saying: "We will not pay "the increase, nor will we make any alteration in the holidays "we grant."

I am of opinion that article 2 and article 9 (2) of the Order do not apply to the facts of the present case, so as to make this an "issue" within the meaning of the Order. The definition of "dispute" in article 12 (1) of the Order covers the controversy in this case which was concerned with the terms of the employment or with the conditions of labour. The "issue" defined in article 2 of the Order is something much wider, in my opinion. That article is concerned with what I may call the general code covering the whole of the particular industry. Where in any industry in any district terms and conditions of employment have been established by negotiation or arbitration between organizations of employers and trade unions, and these organizations may fairly claim to be representative of a substantial proportion of the employers and workers, then these terms and conditions may be called " recognized terms and conditions " and may also, I think, be described as a working code for the industry. The question whether any employer in that district should be bound by that code is properly to be termed an " issue." An organization of employers or a trade union may report that " issue " to the Minister and the Minister may refer it to the tribunal to be decided under the provisions of article 9 (2). The tribunal must then decide: (a) whether recognized terms and conditions applicable to the case exist; (b) whether the employer is observing them; (c) whether the employer, whilst not observing them, is yet observing terms and conditions not less favourable than the recognized terms and conditions, and may make its award to compel the employer to observe what I have called " the code " or such terms and conditions not less favourable than " the code."

It is clear in the present case that no such " issue " arose. There was no attempt to make the employers observe " recognized " terms and conditions " other than the two matters in the agreement of November 29, 1951. It is true that these two matters had been settled by negotiation between the federation and the confederation and were thus " recognized terms and " conditions," and the union was complaining of a failure to implement that agreement, but nevertheless, in my view, that was a " dispute " within the definition in article 12 (1) of the Order rather than an " issue " within article 2 of the Order.

The additional evidence which we heard gave particulars of the awards and agreements dealing with almost every aspect of industrial relations which had been made from time to time in past years. The Handbook of National Agreements is a small volume in itself, and justifies the use of the words " general code " covering the whole of the particular industry, which I have used in an earlier part of this judgment. The agreement of November 29, 1951, is a part of the code and is to be interpreted in the light of some former agreements. Nevertheless, I am of opinion that the matter in question was properly referred to the tribunal as a " dispute " and not an " issue," and comes within article 12 (1) and not articles 2 or 9 of the Order. The questions in dispute were really two isolated matters and in no sense is an " issue " raised as I have defined it.

The Lord Chief Justice appears to have been influenced by what happened before the tribunal when they decided the

" dispute " which had been referred to them. He said: " . . . it " does appear from the affidavit of the managing director of the " employers that when they were before the tribunal in January " of this year the tribunal—and this is not disputed—refused to " go into the question as to the amount of wages and wage rates " and increases paid and granted by the company, stating that the " only question to be determined was whether or not the company " should be bound by the agreement. If that was the question, " it was an issue and it ought to be determined according to the " provisions of article 9 of this Order." [3]

In the award made by the tribunal on January 8, 1953, the contentions of the employers and the union are fully set out. The decision of the tribunal was " that the company should apply to " the workers concerned the provisions of the agreement of " November 29, 1951." This looks on the face of it as though the tribunal had had a " dispute " referred to them and they had treated it as though it had been an " issue." But whether it was a " dispute " or an " issue," they could not decide it without examining the wages paid by the employers and the facts relating to holidays, and the statement of the Lord Chief Justice and the statements in the award seem to be in conflict.

We were assured by counsel for the Minister that whether the matter referred to the tribunal was a dispute or an issue, Technaloy Ld. would be entitled to show, if they could, that the terms and conditions of the employment of their workers were not less favourable than the terms and conditions in the agreement of November 29, 1951. In my opinion, this is quite necessary if the employers are to be treated justly. If, for example, the submission of the union as set out in paragraph 4 of the award were to be accepted, " that the 11s. per week increase " should apply to all adult male workers irrespective of earnings " or of rates actually paid," it would be depriving the employers of the rights expressly given to them by the Order.

I would like to say in conclusion that the terms of the Order are not easy to construe, and that I differ from the Divisional Court with some hesitation; but for the reasons given I think that the matters of difference in this case are properly to be described as a " dispute " and not an " issue," and I would allow the appeal.

ROMER L.J. It is, in my opinion, a matter of some difficulty to fix with exactitude the precise line of demarcation between what is a "dispute" under the Industrial Disputes Order, 1951, and what is an "issue." I am fully in agreement with my brethren in thinking that the conception of an "issue" in the Order is primarily related to the question whether or not a general code of terms and conditions of employment which exist in any particular district should be enforced as a whole on some employer in the district who is not already bound by them. For myself, however, I feel some difficulty in accepting the view that an "issue" is rigidly confined to the question of enforcing a code in its entirety and that any difference between employers and employees which is in any degree narrower in its scope than that cannot constitute an "issue" but must be considered on the footing that it is a "dispute."

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[3] [1953] 1 W.L.R. 1428.

That which may be reported to the Minister by a trade union as an "issue" under article 2 of the Order is whether an employer should observe the recognized terms and conditions, which postulates that the employer concerned is not already observing them. Not the least important of such terms and conditions, presumably, are those which regulate the pay of the workmen; and I think it would be difficult to deny that an employer who disregarded the terms and conditions as to pay but faithfully conformed to the others was not observing the recognized terms and conditions. If so, he could, as it seems to me, be the subject of a report under article 2 and of an award under article 9. It is further to be observed that the tribunal has jurisdiction to act under article 9 if it is "of opinion that there "are recognized terms and conditions applicable to the case," which is narrower language than that used in article 2 and would seem to visualize the imposition by award of something less than the district code in its entirety.

In addition to these considerations, it was suggested in argument before us, with, possibly, some force, that whereas an award on a "dispute" only operates in favour of the particular workmen whom it concerns, an award on an "issue" is, as it were, an award in rem and enures to the benefit of all subsequent employees. If this be so, it would be strange if the hypothetical employer to whom I have previously referred could avoid the imposition of a permanent obligation by showing that he was conforming to all the recognized terms and conditions with the exception of those relating to pay.

I accordingly think, on the whole, that the refusal of an employer to observe an important part, but only a part, of a general code, may be reported as an issue under article 2 and determined by the tribunal as such. If so, can a limited "issue" of this description be treated as a "dispute" as well? It is not outside the definition of "dispute" in article 12 of the Order. That definition includes all disputes between an employer and his workmen other than a dispute as to the employment or non-employment of any person, or as to whether any person should or should not be a member of any trade union. It seems to me, therefore, that such an "issue," being within the definition, can also be considered on the footing that it is a "dispute" unless there is some good reason, procedural or otherwise, for regarding all "issues" and "disputes" as being mutually exclusive. So far as procedure is concerned, I can see no such reason. An "issue" has to be reported either by an organization of employers or a trade union, whereas a "dispute" can be reported by an organization of employers, on behalf of employers who are parties to the dispute, or by an employer, where the dispute is between that employer and his workmen, or by a trade union, on behalf of workers who are parties to the dispute. This distinction certainly supports the view which my brethren take, and which I myself accept, that an "issue" primarily involves a question as to whether a particular employer should be bound to accept a general code, for the machinery in relation to it can only be started by a representative body and not by an individual. I think that this difference in the manner of reporting the two types of disagreement does tend to show, therefore, that a "dispute" is regarded as being rather more of a parochial affair than an "issue."

Nevertheless, it does not, in my opinion, prevent in itself the partial non-observance of recognized terms and conditions from constituting an "issue." Another difference in procedure is that, under article 8 (1), the reference of a "dispute" must be within 14 days of it being reported to the Minister (though the Minister may extend it), whereas there does not appear to be any similar requirement with regard to an "issue"; I do not think, however, that much significance attaches to this. There is, however, a further difference between the treatment of a "dispute" and that of an "issue" which is of some importance. The tribunal, in determining a "dispute," can and should take into consideration every circumstance, including, for example, an alleged increase in the cost of living, that has a bearing upon the claim; and amongst such relevant circumstances there would, of course, be included any terms and conditions of employment that are generally observed in the district. On the other hand, when an "issue" has to be determined the only circumstances with which the tribunal are concerned are the recognized terms and conditions applicable to the case, and those which in fact exist as between the employer and workmen concerned; and such matters as an increase in the cost of living would seem to be irrelevant to the tribunal's decision. This difference in approach furnishes some reason for not treating a "dispute" as an "issue," but seems to me to afford no legitimate reason for not treating a partial disregard of recognized terms and conditions as a "dispute." I can see no other reason, apart from those which I have mentioned, arising from procedural requirements or otherwise, which would prevent an issue of a limited character, such as I have mentioned, from being referred to the tribunal as a "dispute."

I am accordingly of opinion, on the whole, that the failure or refusal of an employer to observe some part only of a generally accepted code may constitute an "issue" and be referred to the tribunal as such, but it may nevertheless also be a "dispute" within the definition in the Order and be reported and determined upon that footing. It seems to me, indeed, that too rigid a distinction between the two kinds of difference envisaged by the Order, involving as it does the view that "disputes" and "issues" are mutually exclusive, might well lead to trouble in the working of the Order—as it has in fact led to trouble in the present case. In my judgment, there may in some cases, although not, perhaps, in many, be an overlap between the two.

In my opinion the present is such a case. It is quite clear that the Amalgamated Union of Foundry Workers approached Technaloy's alleged disregard of the agreement of November 29, 1951, on the footing that it gave rise to an "issue." The question which they submitted to the Regional Industrial Relations Officer in their letter of September 15, 1952, was stated to be one as between the union and the company and was not (on the face of it) reported by the union on behalf of the workers. Further, the "failure to agree" which they reported in this letter was the failure of the employers "to implement the "agreement as between the Engineering and Allied Employers' "National Federation and the Confederation of Shipbuilding and "Engineering Unions dated November 29, 1951, relative to "national wages increase and the provision of 16 days' holiday "per annum." This report was sent on September 11, 1952, and on September 15, Mr. Murad, the company's managing director, wrote to the Regional Industrial Relations Officer a letter in which he said: "These people," namely, the union, "are under a

" complete misapprehension because we are not members of the " Employers' Federation and are therefore not bound by an " agreement existing between them and the union. In any case " we are quite satisfied that our employees work under conditions " which are far more generous than any covered by the agree- " ment."

A copy of this letter (which was strongly reminiscent of article 9 of the 1951 Order) was sent to the union, and in a letter to the company from Mr. Gardner, the union general secretary, dated October 2, he wrote: " We would like to point out that on " the very rare occasions when we have gone to arbitration with " matters of this kind the decision has always been given in " favour of this union, especially where firms are not adhering " to the recognized rates and conditions of employment obtaining " in that particular district." Finally, in their official demand for arbitration on November 19, the union reported to the Ministry " the position of ' Failure to agree ' between Messrs. " Technaloy Ld. and this organization," and that the terms of reference were " Failure to agree to implement the agreement " of November 29, 1951. Accordingly, it seems to me that the parties themselves regarded the question which the union raised as being of the nature of an " issue." Nor, in my opinion, were the parties altogether wrong in so regarding it. Since the first hearing of this appeal before us further evidence has been filed giving details about the large number of national agreements and awards of the tribunal governing industrial relations, working conditions, wages and other terms and conditions of employment in the founding industry, and which together constitute the general code. Although the agreement of November 29, 1951, which the union is seeking to enforce on Technaloy, is only a unit in this code, it is not a self-contained unit for, as Mr. Murad points out in his affidavit of March 25, 1953, the agreement cannot very well be implemented without at the same time implementing pre-existing agreements and awards relating to rates of pay, working hours, and so on; and these are matters which are of the very core of the " recognized terms and conditions." In these circumstances, it does appear to me, as it appeared to the parties themselves, that the magnitude and scope of the difference in question elevates it to the status of an " issue." On the other hand, the union are not in form, nor, I think, in substance, asking the tribunal to make an award enforcing upon the company the code in its entirety. It is, therefore, in my opinion, a case which the Minister could have referred to the tribunal as an " issue "

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but was entitled to refer as a "dispute," and which the tribunal can properly hear and determine as such.

I am accordingly in agreement with my brethren, though for somewhat different reasons, in thinking that this appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *W. H. Thompson; Hardman, Phillips & Mann; Solicitor, Ministry of Labour.*

A. W. G.

1953
Oct. 19, 20,
21, 22, 23,
26, 27, 28,
29, 30, 31;
Nov. 2, 3,
4, 12.

McNair J.

C. A.

1954
Mar. 22, 23,
24, 25;
Ap. 8.

Somervell,
Denning and
Morris L.JJ.

ROE v. MINISTER OF HEALTH AND ANOTHER.
WOOLLEY v. SAME.

[1949 R. No. 3784.]
[1948 W. No. 3792.]

Negligence—Onus of proof—Res ipsa loquitur—Operation under control of two persons—Hospital—Anaesthetist—Operations—Injection of spinal anaesthetic—Ampoule cracked—Contamination by phenol—Plaintiffs permanently paralysed—Liability of hospital for acts of specialist anaesthetist — Respondeat superior — Liability of anaesthetist.

Hospital—Negligence. Vicarious Liability. Causation. Damages—Remoteness. Negligence—Duty of care.

Two patients in hospital were operated on on the same day. Both operations were of a minor character, and in each case nupercaine, a spinal anaesthetic, was injected by means of a lumbar puncture by a specialist anaesthetist assisted by the theatre staff of the hospital. The nupercaine had been contained in sealed glass ampoules which had been stored in a solution of phenol. After the operations both patients developed severe symptoms of spastic paraplegia, caused by phenol, which had percolated into the ampoules through invisible cracks or molecular flaws, resulting in permanent paralysis from the waist down. Actions for damages for personal injuries were brought by both of the patients against the Minister of Health as successor in title to the trustees of the hospital, and against the anaesthetist. The anaesthetist carried on a private anaesthetic practice but was under an obligation, with another anaesthetist, to provide a regular service for the hospital.

The trial judge found for the defendants. He rejected the contentions of the plaintiffs that the doctrine res ipsa loquitur applied, and held that the hospital was not responsible for the acts of the anaesthetist, and that the plaintiffs' claims failed against both defendants. On appeal:—

Held, that the anaesthetist was the servant or agent of the hospital and the hospital were liable for his acts on the principle of respondeat superior.

Gold v. *Essex County Council* [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237 and *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574 applied.

Held, further, that applying the test of what was the standard of medical knowledge in 1947 in respect to the detection of the presence of the phenol in the ampoules, at the time of the operations, neither the anaesthetist nor any member of the hospital staff had been guilty of negligence, and the appeals failed.

Decision of McNair J. affirmed.

ACTIONS.

In consolidated actions the plaintiffs, Cecil Henry Roe, a farm labourer, aged 46, and Albert Woolley, a labourer, aged 51, claimed damages for personal injuries which they suffered as the result of the administration to them of a spinal anaesthetic on October 13, 1947, at the Chesterfield and North Derbyshire Royal Hospital. In each case the surgical operation for which they were anaesthetized was of a minor character, but in each case, owing, as the trial judge found, to the contamination of the anaesthetic by phenol, the patient developed a condition of spastic paraplegia, which resulted in permanent paralysis from the waist down. The contamination was found by the judge to have been caused by the percolation of phenol (in which the glass ampoules containing the anaesthetic were stored) through invisible cracks or molecular flaws in the ampoules. In those circumstances the plaintiffs claimed damages against the Minister of Health as successor in title, under the National Health Service Act, 1946, and the National Health Service (Appointed Day) Order, 1948, to the trustees of the hospital, and also against Dr. J. Malcolm Graham, who was responsible for the administration of the anaesthetic in each case. The manufacturers of the anaesthetic, Ciba Laboratories, Ld., were joined as third defendants, but during the hearing were dismissed from the case.

Both actions came before McNair J., who on November 12, 1953, dismissed them and delivered the following judgment.

McNAIR J., having stated the facts, continued: The method of anaesthesia employed was the well-known method of injecting nupercaine into the patient's theca by means of a lumbar puncture between the lumbar vertebrae. This method, at any rate in 1947 before the general development of the use of other relaxant drugs, was widely used and had the advantage of securing by a simple technique normally involving little distress to the patient a complete relaxation in the field of the intended operation.

I desire to emphasize at the outset that no charge of negligence was made based upon the adoption of this method of anaesthesia for the two operations in question. At the hearing before me, which lasted for eleven days, I had the advantage of hearing the evidence given by a number of surgeons, neurologists, anaesthetists and pathologists of the highest professional standing, who, while each desiring to assist the court without any reservation, differed widely in many respects in their views of the cause of the condition which developed in both plaintiffs following upon the administration of the anaesthetic. I have had accordingly a more than usually anxious task in attempting to reach a solution.

[His lordship described the anatomy of the spinal column, stated the facts as to the development of the disease in each case, reviewed the evidence and continued:] In these circumstances Mr Elwes as counsel for the plaintiffs, emphasizing the close parallelism between the two medical histories and the fact that injuries of this nature do not normally follow from spinal anaesthetics properly administered, submits that the doctrine of res ipsa loquitur applies (a) as against the hospital on the basis that in law the hospital is responsible for the actions of Dr. Graham as well as for the actions of the theatre staff; (b) as against Dr. Graham on the ground that he administered the anaesthetic and had control of the theatre staff in all revelant respects.

The validity of this submission in my judgment depends on determining (1) the extent of the obligation assumed by the hospital towards patients received by the hospital; (2) the position of Dr. Graham in relation to the hospital; and (3) the extent, if any, of the application of the doctrine of res ipsa loquitur where the offending object or operation is under the control of two persons not in law responsible for the acts of each other. [His Lordship then stated the facts with regard to the qualifications and position of Dr. Graham * and continued:]

I now turn to (1), the problem of the obligation assumed by the hospital towards patients received for treatment. The two most relevant authorities, both of which are binding upon me, are the decisions of the Court of Appeal in *Gold* v. *Essex County*

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* See post, p. 69.

Council[1] and *Cassidy* v. *Ministry of Health.*[2] I take as my guide the passage in the judgment of Lord Greene M.R. in *Gold's* case[3]: "The question which presents itself in the present case "may, therefore, be formulated as follows: when a patient "seeking free advice and treatment such as that given to the "infant plaintiff knocks at the door of the defendant's hospital, "what is he entitled to expect? He will find an organization "which comprises consulting physicians and surgeons, presum- "ably also house physicians and surgeons, a staff of nurses, "equipment for administering Grenz ray treatment and a radio- "grapher, Mead, employed to give that treatment. So far as "consulting physicians and surgeons are concerned, clearly the "nature of their work and the relationship in which they stand "to the defendants precludes the drawing of an inference that "the defendants undertake responsibility for their negligent "acts."

I also think it is clear that the judgments of Somervell and Singleton L.JJ., who formed the majority on this point in *Cassidy's* case,[4] proceed on the same basis. No useful purpose would be served by my expressing my own views upon the judgment of Denning L.J. in the latter case, which states the hospital's obligation in much wider terms, except to say that there is in my judgment much force in the criticism directed by Mr. Berryman against Denning L.J.'s reading of the decision in *Mersey Docks and Harbour Board* v. *Coggins and Griffiths (Liverpool) Ld.*[5] which apparently forms the basis of this judgment.

I accordingly conclude (1) that so far as Dr. Graham was concerned, the hospital's obligation towards their patient was limited to providing a competent anaesthetist, which obligation the hospital undoubtedly fulfilled, and that the hospital was not liable in law for his acts of negligence, if any; and that so far as the theatre staff were concerned, the hospital assumed towards their patients the vicarious responsibility of a master for his servants. (2) It follows from what I have said above that in my judgment the position of Dr. Graham as a specialist anaesthetist was comparable to that of a visiting surgeon or physician for whose acts the hospital does not assume responsibility in law. As to (3) the extent of the application of the doctrine of res ipsa loquitur where the thing or operation is under the control of two persons not in law responsible for each other—I am unable to understand how it can be said that the maxim can apply to either of such persons, since the res, if it speaks of negligence, does not speak of negligence against either individually: see the passage in Lord Murray's speech in *Carruthers* v. *Macgregor.*[6] In this connexion reference should also be made to the words of Farwell L.J. in *Hillyer* v. *St. Bartholomew's Hospital,*[7] quoted by Somervell L.J. in *Cassidy's* case.[8]

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[1] [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237.

[2] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[3] [1942] 2 K.B. 293, 302.

[4] [1951] 2 K.B. 343.

[5] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

Furthermore, it was established on the evidence that, though the anaesthetist is responsible for the choice of the anaesthetic, for the giving of directions as to its preparation and for general supervision of the activities of the theatre staff, he cannot properly be regarded as responsible for their casual acts of negligence.

Accordingly, in my judgment the ordinary onus rests upon the plaintiff of proving negligence against the hospital or Dr. Graham. It being conceded that the injection of nupercaine per se was on the facts of this case not negligent, and it being clearly established on the medical evidence that the injuries were not caused (1) by an infective organism, as in *Voller* v. *Portsmouth Corporation,*[9] or (2) by traumatic injury to the spinal column by the needle itself, and no other contaminant than phenol being suggested, the first step in this proof of negligence must be to satisfy the court that the injuries were in fact caused by the injection of phenol.

None of the medical witnesses had consciously ever seen the results of injecting phenol into the human theca. Accordingly, the arguments for and against this view had necessarily to be based largely on deductive reasoning from the observed effects of phenol in other circumstances and the known effects of other toxic substances on the contents of the theca itself. After the most anxious consideration I have come to the conclusion that the phenol theory is sufficiently established for it to form the basis of a finding by the court that the injuries were in fact caused by the injection of phenol with the nupercaine, and I so find.

[His Lordship then considered the allegations of negligence seriatim and held (1) that on the standard of medical knowledge to be imputed to a competent anaesthetist in 1947 Dr. Graham was not negligent in failing to appreciate the risk of phenol percolating into the ampoules of nupercaine through " invisible cracks " or molecular flaws in the glass; (2) applying the test laid down by Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*,[10] there were no positive proved facts from which an inference as to the amount of phenol which percolated could be drawn; (3) that on the evidence it would be impossible to infer that the percolation could have taken place through visible cracks, and accordingly, if on proof of damage by phenol the burden shifted to Dr. Graham to displace the implication of negligence he had successfully discharged the burden by showing that phenol in a significant quantity could percolate into an ampoule otherwise than by visible cracks, and remain undetected without negligence on his part; and (4) Dr. Graham was not negligent on the standard of a reasonably competent anaesthetist in 1947 in failing to adopt a colour technique which might have disclosed the presence of a risk which he did not, in common with many other competent anaesthetists, appreciate as a possibility.]

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[6] 1927 S.C. 816, 823.

[7] [1909] 2 K.B. 820, 827; 25 T.L.R. 762.

[8] [1951] 2 K.B. 343, 354.

[9] (1947) 203 L.T.J. 264.

As regards the hospital his Lordship held that the cracks in the ampoules, if any, could not reasonably be attributed to negligence on the part of the theatre staff. In the result he dismissed both actions.

The plaintiffs appealed.

Richard Elwes Q.C. and *John Hobson* for the plaintiffs. The obligation assumed by the hospital authority towards its patients is to provide the necessary treatment: *Gold* v. *Essex County Council.*[1] In this case the hospital authority was under a duty to provide both surgical and ancillary treatment. On the basis of Denning L.J.'s judgment in *Cassidy* v. *Ministry of Health*[2] it is no defence for a hospital to allege that its failure to carry out its obligations was due to the act of a person for whom the hospital was not answerable in law on the basis of respondeat superior. If that is putting it too high, then it is submitted that this is a case of vicarious liability, the hospital authority being responsible for negligent acts proved to have been committed by its servants. On the basis of Somervell and Singleton L.JJ.'s judgments in *Cassidy's* case,[2] Dr. Graham was a servant of the hospital authority. It is clear from the facts of this case that he was employed under a contract of service and not under a contract for services. He was employed with Dr. Pooler to provide a complete service of anaesthesia every day throughout the year for both ordinary and emergency cases. The hospital obviously set out to provide for the day-to-day necessities of the hospital. There is no great difference between engaging an anaesthetist to administer anaesthetics and employing a nurse or a house surgeon. Therefore, whether the test is that applied by Denning L.J. or that by Somervell and Singleton L.JJ. the hospital still remains liable in law for his negligent acts.

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[10] [1940] A.C. 152, 169; 55 T.L.R. 1004.

[1] [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237.

[2] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

Dr. Graham's duty was to administer anaesthetics with skill and care, to choose a system of asepsis and to be responsible generally for its working supervision. He also had a duty to ensure that the system was safe. To succeed in their claims the plaintiffs must prove that their injuries resulted from a breach of one or more of these obligations.

Reliance is placed on the maxim res ipsa loquitur, and it is submitted that it arises on the facts of this case. The injuries which the plaintiffs suffered do not normally result from a spinal injection. The injuries were exceptionally grave. The injuries happened on the same day and in the same way. No circumstances could call more clearly for explanation. Res ipsa loquitur applies equally against both defendants. Assuming that Dr. Graham was the servant of the hospital, the hospital was in control of all relevant activities. Assuming that Dr. Graham was not a servant, the maxim applies against him because he administered the anaesthetic, was responsible for the asceptic technique and was, therefore, in control of everything which could have caused the injuries. The onus is on him to show that the injuries were not the result of his negligence. The trial judge rejected the contention that the maxim is applicable. He did so on the basis that it could never be applicable when the matter in question was under the control of two defendants who, as he found, were not mutually responsible for each other.

The reported cases in which the maxim res ipsa loquitur has been invoked are not of assistance except in so far as they provide guidance to the court as to the circumstances in which this presumption of fact will arise and the escape therefrom, which is emphasized in *Ballard* v. *North British Railway.*[3] In the past the courts have relied a good deal on the fact that when a patient is lying unconscious in an operating theatre the doctors and nurses have been in command of the situation. If something goes wrong they ought to explain why it has gone wrong, and the onus is on them to prove that the injury did not result from the negligent performance of some act or the negligent omission of some act. In this case the onus lies equally on both defendants to prove that they have not been negligent. The judge found that the injuries were caused by phenol, and that finding is not now contested. It is, therefore, for those in control of the situation to prove that phenol could get into the theca without negligence on their part. If they do that the onus is thrown back on the plaintiffs to prove negligence. If the circumstances are such that it is open to the plaintiff to invoke the maxim, and he calls evidence to support his case, the proper task of the court is to consider whether or not the defendants, by their evidence, have discharged the onus cast upon them.

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[3] 1923 S.C.(H.L.) 43.

[SOMERVELL L.J. I would have thought that the question was one of the balance of probability. Have you any authority on which you base your res ipsa loquitur submission?]

[Counsel cited *Baker* v. *Market Harborough Industrial Co-operative Society*[4] and *Mahon* v. *Osborne*.[5]] In the latter case MacKinnon and Goddard L.JJ. held that the maxim applied. Scott L.J. dissented, but, it is submitted, he did so because of the uncertainty as to whether the surgeon or the nurse was negligent.

Montague Berryman Q.C., *R. Marven Everett Q.C.* and *J. S. Macaskie* for the Minister of Health. The maxim res ipsa loquitur does not apply in the present case. The judge heard the evidence of medical men, chemists and scientists and the findings which he came to are findings of fact. In the court below it was contended that whatever else had done the mischief it was not phenol, but in the result, although nobody was prepared to be very dogmatic, the judge resolved, on the probabilities of the matter, that it was the phenol which had seeped into the ampoules through molecular or invisible cracks. It would not be right to invite this court to upset that finding. The judge also found that there was no negligence proved against the hospital staff, and it is submitted that it was the right conclusion. Putting aside for a moment the legal position as between the hospital and Dr. Graham, the whole system of administering the anaesthetic had been devised by, and was under the control of, the two anaesthetists. It was sought to say in the court below that Dr. Graham was following rather blindly in the footsteps of Dr. Pooler, the senior anaesthetist. That is the precise opposite to the truth. It is abundantly clear that Dr. Graham was throughout, in regard to tinting, and the way in which the system was carried out, exercising his own judgment.

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[4] [1953] 1 W.L.R. 1472.

[5] [1939] 2 K.B. 14.

The hospital authority has carried out its obligations to the plaintiff by providing the necessary treatment. It is not responsible for the negligent acts of the anaesthetist. He is a consulting anaesthetist and in exactly the same position in relation to the hospital as a visiting surgeon or physician for whose negligent acts the hospital authority is not in law responsible: see *Gold* v. *Essex County Council*, *per* Lord Greene M.R.,[6] and *Cassidy* v. *Ministry of Health*, *per* Somervell and Singleton L.JJ.[7] In *Cassidy's* case[7] a hospital authority was held to be liable for the negligent acts of a full-time medical officer and a house surgeon, but the basis of the judgments of Somervell and Singleton L.JJ. was that both doctors were employed under contracts of service and were servants of the hospital authority. Somervell L.J. pointed the distinction between a contract of service and a contract for services. He referred in terms to consulting surgeons and physicians and took the same view as that taken by Lord Greene M.R. in *Gold's* case.[8] Denning L.J. considered that the distinction between a contract of service and a contract for services was irrelevant for the purposes of determining the hospital authority's liability, holding that control over the work was not the determining factor. He said that the hospital was liable if the doctor or surgeon was employed and paid by the hospital as the hospital had in its hands the ultimate sanction for good conduct, the power of dismissal. It is submitted that Denning L.J. based his judgment on Lord Simond's speech in *Mersey Docks and Harbour Board (Liverpool) Ld.* v. *Coggins and Griffiths*,[9] where the House of Lords considered the liability of the board for the negligent acts of a crane driver and held that the board, the employer, was liable even though the crane driver, a skilled man, in carrying out his work, could say "I take no orders from anybody." "Yet," said Lord Simonds, "ultimately he would decline to carry it out in the appellants' "way at his peril, for in their hands lay the only sanction, the "power of dismissal."[10]

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[6] [1942] 2 K.B. 293, 302.
[7] [1951] 2 K.B. 343.
[8] [1942] 2 K.B. 293, 302.
[9] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.
[10] [1947] A.C. 1, 20.

That clearly indicates that the employer had in fact an ultimate right to control the work of the crane driver. It is submitted that the right to control is the true test of liability. Applying that test in this case, the hospital authority has no right to control the work of Dr. Graham. He is entitled to choose any anaesthetics he pleases and therefore the hospital authority cannot be liable for his negligence. He is not employed under a contract of service, and on the basis of Somervell and Singleton L.JJ's judgment in *Cassidy's* case[11] he is not the servant of the hospital authority. If that be right, the maxim res ipsa loquitur cannot apply. Some of those involved in the operation were servants of the hospital and some were not. Therefore it cannot be asserted that the injury was caused by those who were the servants of the hospital. If the maxim applies prima facie, the onus of proving negligence goes back on the plaintiffs. If more than one theory of causation for the injuries is put forward, one of which can reasonably afford an explanation not involving negligence the onus of proving negligence is on the plaintiff: *Ballard* v. *North British Railway*, *per* Lord Dunedin[12]; *The Kite.*[13]

H. B. H. Hylton-Foster Q.C. and *J. R. Cummings-Bruce* for Dr. Graham. It is not contended that if a deeper tinting of the phenol had been used the contamination of the nupercaine would not have been detected. But the case has to be decided by the standard of medical knowledge in 1947, and the emphasis which is now laid, in medical literature, on colouring only appeared after this case had occurred. The judge was entitled to find, and rightly found, that the system of immersion was not defective and that Dr. Graham had not been negligent.

Cur. adv. vult.

April 8. The following judgments were read.

SOMERVELL L.J. The two plaintiffs in these consolidated actions were both anaesthetized by a spinal anaesthetic for minor operations on October 13, 1947, at the Chesterfield and North Derbyshire Royal Hospital, now represented by the first defendant, the Ministry of Health. The results were tragic in that both men were and have since remained paralysed from the waist downwards. Each claims in negligence. The second defendant is the anaesthetist, and one of the issues was whether the principle respondeat superior was applicable as between the hospital and him. The spinal anaesthetic used was nupercaine, manufactured and supplied by the third defendant, Ciba Laboratories. It was supplied in glass ampoules, one of which was used for each patient. The suggestion that the nupercaine in the two ampoules in question must have been defective or contaminated before delivery to the hospital was, after investigation, abandoned at the trial. The third defendant was, therefore, not concerned in the substantive appeal.

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[11] [1951] 2 K.B. 343.

[12] 1923 S.C.(H.L.) 43, 53.

[13] [1933] P. 154; 49 T.L.R. 525.

The judge found for the defendants and the plaintiffs appeal. He found that the damage had been caused by phenol, which had percolated into the ampoules from a solution in which the two ampoules, with others, had been immersed. There was difference of opinion among the experts, but this finding was accepted by all counsel before us as the explanation, and the question, therefore, is whether this percolation was caused by the negligence of the defendants or either of them.

The ampoules were about 5 inches high, 1 inch in diameter, narrowing towards the top to a neck about ¼ inch in diameter, and swelling out slightly above the neck and then tapering. The ampoule was opened by filing and then breaking at the neck. Each contained 20 cc. of nupercaine. As delivered by the makers the outside and label were not sterilized. They were to be treated, as a notice on the box stated, as "frankly septic." The needle of the syringe could be inserted through the neck, when the ampoule had been opened, without coming in contact with the outside of the ampoule. The ampoule would be held by the sister and the syringe by the anaesthetist and there was a possibility of accidental contact.

It is plain that this possibility exercised a good many anaesthetists round about 1946. There was at the Chesterfield and North Derbyshire Royal Hospital Dr. Pooler, the senior anaesthetist, the second defendant, and a resident anaesthetist who was clearly of a lesser status and who is not concerned in this case. In 1947 Dr. Pooler and Dr. Graham discussed the danger of sepsis as described above, and the importance of sterilizing the ampoules. Dr. Pooler in fact started for his cases the method which was used by Dr. Graham at the date of the operations on the plaintiffs. That was to immerse the ampoules in a 1 in 20 solution of phenol for twenty minutes and then in a 1 in 40 solution for twelve or more hours.

On the judge's finding a quantity of this phenol solution, sufficient to cause the paralysis, percolated through a crack in each ampoule, sufficient nupercaine being left to anaesthetize each patient. There was no precise evidence as to the amount of phenol solution necessary to cause the injuries, but probably about one-fifth of the volume of the nupercaine. Each plaintiff had an injection of 10 cc. If about one-fifth was phenol solution one would expect anaesthesia and injury.

Dr. Graham appreciated the possibility of cracks and the great danger of phenol solution if injected into the spine. He examined each ampoule for cracks before taking its contents or part of them into the syringe. The judge accepted his evidence that he made such an examination carefully in these cases. "I "did not believe for one moment that I could have missed a "crack," he said. Was he negligent in so believing? The judge deals with this matter in the following paragraph[1]: "It is now "clear that phenol can find its way into an ampoule of nuper-"caine stored in a solution of phenol through cracks which are "not detectable by the ordinary visual or tactile examination "which takes place in an operating theatre—these cracks were "referred to in the evidence as 'invisible cracks'—or through "molecular flaws in the glass. The attention of the profession "was first drawn to this risk in this country by the publication "of Professor Macintosh's book on Lumbar Puncture and Spinal "Anaesthesia in 1951. In 1947 the general run of competent "anaesthetists would not appreciate this risk. Dr. Graham "certainly did not appreciate this as a risk. I accordingly find "that by the standard of knowledge to be imputed to competent "anaesthetists in 1947, Dr. Graham was not negligent in failing "to appreciate this risk and a fortiori the theatre staff were not "negligent."

I accept this. Though Mr. Elwes did not accept these findings, his main attack on Dr. Graham was based on a different matter. There was evidence that in some hospitals where the immersion system was used the disinfecting liquid, whether a phenol solution or surgical spirit, was stained a deep tint with methylene blue or some other dye. Professor Macintosh described the liquids he had seen as the colour of ink. This would make it easier, of course, to detect percolation. It was a method used by Ciba Laboratories and was known to analytical chemists. A certain amount of confusion arose from the fact that the two solutions of phenol in which the ampoules were immersed were coloured though not deeply. This was not done as a precaution against percolation. The 1 in 20 phenol solution was coloured a light blue and the 1 in 40 a light pink for general purposes of identification and not as a precaution against cracked ampoules. As a precaution for this latter purpose the colouring was, as Professor Macintosh said, quite inadequate. Dr. Graham gave certain answers which might have meant that he was relying on colour to detect cracks. If so, it should have been deeper. I agree with Mr. Hylton-Foster's submission that, taking his evidence as a whole, he was not. If, of course, he had seen that the liquid in an ampoule was pink, he would at once have realized there had been substantial percolation. He was, however, relying on his visual inspection. Mr. Elwes submitted that once the plaintiffs had shown that this precaution was taken in some other hospitals the onus passed to Dr. Graham or the hospital to explain why it was not adopted in the present case. If the onus did so pass, I think that it was discharged.

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[1] [1954] 1 W.L.R. 128, 133.

Mr. Hylton-Foster conceded in the course of the trial and before us that if there had been deep tinting it would probably have disclosed any dangerous percolation. The judge, who had many difficult matters to deal with, of which he has relieved us, did not, I think, fully appreciate this concession. However, the other reasons which he gives in my opinion justify his finding, with which I agree, that Dr. Graham was not negligent. Dr. Graham had never heard of deep tinting as a precaution. There had been a reference in American publications to colouring, but the only paper traced on " immersion " in this country made no reference to deep tinting as an ingredient of the process. On one occasion Dr. Graham found an ampoule which had been cracked or broken at the top. I do not think this assists either side. Mr. Hylton-Foster submitted, I think with force, that if anything it confirmed Dr. Graham's view that cracks would be visible. The actual method of immersion without deep tinting was introduced and used in the first instance by his senior, Dr. Pooler. Dr. Graham was entitled to place some reliance on that. It would obviously be wrong to infer negligence from the fact only that it was used in some other hospitals. I felt at one time that as Dr. Pooler had started the system it would have been right that the hospital should have called him. They were, however, submitting that he was not their servant, and on that basis it was, I think, reasonable for them not to call him. If it had been obvious or accepted that he was their " servant " for this purpose, it might well have been a matter for comment if he had not been called.

It is well to consider the nature of the allegation here made with regard to Dr. Graham's interests as well as his duties. If a man driving a motor-car is late for an urgent appointment he has at any rate a motive for taking a risk. What, however, is the suggested act of negligence here? It is a failure to instruct a sister to put dye into a solution of phenol. It imposes no burden on the doctor except the speaking of a sentence. He or Dr. Pooler would have every motive for putting this minor burden on the nursing staff if either had any idea that it might prevent injury to his patients. There is, in my opinion, on the evidence no justification for finding that Dr. Graham was negligent in this matter.

The judge found that the hospital was not liable in law for Dr. Graham's acts of negligence, if any. I will set out the passage in which the judge states the position of Dr. Pooler and Dr. Graham [2]: "In October, 1946, he was with Dr. Pooler, who "had taken his diploma of anaesthesia some years earlier, "appointed as a visiting anaesthetist to the hospital. He and "Dr. Pooler between them were under obligation to provide a "regular anaesthetic service for the hospital, it being left to them "to decide how to divide up the work. In fact, apart from "emergencies, they worked at the hospital on alternate days. "The hospital set aside a sum of money out of their funds "derived from investments, contributions and donations for "division among the whole of the medical and surgical staff, "including visiting and consulting surgeons as the participants "might decide. Dr. Graham participated in this fund but other-"wise received no remuneration from the hospital. He was at all "times allowed to continue his private anaesthetic practice."

The judge referred to *Gold* v. *Essex County Council* [3] and *Cassidy* v. *Ministry of Health*.[4] He assimilated Dr. Pooler and Dr. Graham to the "consulting physicians and surgeons" referred to by Lord Greene in *Gold's* case.[5] The line suggested in that case and in *Cassidy's* case [6] in the judgments of Singleton L.J. and myself may not be a very satisfactory one, but I would have regarded Dr. Pooler and Dr. Graham as part of the permanent staff and, therefore, in the same position as the orthopaedic surgeon in *Cassidy's* case. Like him they are, of course, qualified, skilled men, controlling as such their own methods. The positions of surgeons and others under the National Health Service Act, 1946, will have to be decided when it arises. The position of hospitals under that Act may or may not be different from when they were voluntary or municipal hospitals.

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[2] [1954] 1 W.L.R. 131.

[3] [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237.

[4] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[5] [1942] 2 K.B. 293, 302.

[6] [1951] 2 K.B. 343.

Having regard to my conclusion with regard to Dr. Graham, the matter is relevant only on the alleged application of res ipsa loquitur. The judge said that that principle could not apply to a case where the operation was, as he held here, under the control of two persons not in law responsible for each other. Our attention was drawn to some observations in *Mahon* v. *Osborne* [7] which suggest that this is too widely stated. As to the maxim itself, I agree, with respect, with what was said by Lord Radcliffe in *Barkway* v. *South Wales Transport* [8]: "I find nothing "more in that maxim than the rule of evidence, of which the "essence is that an event which in the ordinary course of things "is more likely than not to have been caused by negligence is by "itself evidence of negligence." In medical cases the fact that something has gone wrong is very often not in itself any evidence of negligence. In surgical operations there are inevitably risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who could throw light on what happened were not called. Having come to the conclusion that the hospital were responsible for Dr. Graham, the judge's reason (which is applicable in certain cases) for excluding the maxim has not operated on my mind.

I will now turn to the second main submission by Mr. Elwes. Invisible cracks are none the less cracks and would not have been there if the ampoules had been carefully handled by the nursing staff. Therefore, there must have been negligent handling. And, of course, if the submission is to succeed, that negligent handling must have caused the injury. A number of experiments were conducted to try to crack ampoules in the way in which they must have been cracked on the findings. It was, of course, possible to break them if handled sufficiently roughly. It was found very difficult to produce an invisible or difficultly visible crack except by thermal methods. It would be a very speculative basis on which to find some unidentified nurse negligent. I think, however, making assumptions in the plaintiffs' favour, the submission fails on causation. I will assume that a nurse knocked two ampoules together as she was placing them in the basin and this " rough " handling caused the " invisible " cracks. It would obviously be inadvertent and I will assume negligent. The duty as such not negligently to mishandle equipment would be a duty owed to the hospital. If an ampoule were dropped and broken there would clearly be no breach of any duty to a patient. In the case I am assuming, having knocked the ampoules the natural inference is that the nurse would look to see if they were cracked. This is what every normal person who has dropped or knocked something does. Is it broken? As the judge has found there was no visible crack and the nursing staff had no reason to foresee invisible cracks, the nurse would reasonably assume no harm had been done and would let the ampoule go forward. The duty which the nursing staff owed to the plaintiffs was to take reasonable care to see that cracked or faulty ampoules did not reach the operating theatre. That duty would not, in my opinion, be broken in the circumstances and on the assumption as set out above.

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[7] [1939] 2 K.B. 14; [1939] 1 All E.R. 535.

[8] [1950] A.C. 185; [1950] 1 All E.R. 392, 403.

For these reasons I would dismiss the appeal.

DENNING L.J. No one can be unmoved by the disaster which has befallen these two unfortunate men. They were both working men before they went into the Chesterfield Hospital in October, 1947. Both were insured contributors to the hospital, paying a small sum each week, in return for which they were entitled to be admitted for treatment when they were ill. Each of them was operated on in the hospital for a minor trouble, one for something wrong with a cartilage in his knee, the other for a hydrocele. The operations were both on the same day, October 13, 1947. Each of them was given a spinal anaesthetic by a visiting anaesthetist, Dr. Graham. Each of them has in consequence been paralysed from the waist down.

The judge has said that those facts do not speak for themselves, but I think that they do. They certainly call for an explanation. Each of these men is entitled to say to the hospital: " While I was in your hands something has been done to me " which has wrecked my life. Please explain how it has come " to pass." The reason why the judge took a different view was because he thought that the hospital authorities could disclaim responsibility for the anaesthetist, Dr. Graham: and, as it might be his fault and not theirs, the hospital authorities were not called upon to give an explanation. I think that that reasoning is wrong. In the first place, I think that the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authorities are responsible for all of them. The reason is because, even if they are not servants, they are the agents of the hospital to give the treatment. The only exception is the case of consultants or anaesthetists selected and employed by the patient himself. I went into the matter with some care in *Cassidy* v. *Ministry of Health* [9] and I adhere to all I there said. In the second place, I do not think that the hospital authorities and Dr. Graham can both avoid giving an explanation by the simple expedient of each throwing responsibility on to the other. If an injured person shows that one or other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation: see *Baker* v. *Market Harborough Industrial Co-operative Society*.[10]

I approach this case, therefore, on the footing that the hospital authorities and Dr. Graham were called on to give an explanation of what has happened. But I think that they have done so. They have spared no trouble or expense to seek out the cause of the disaster. The greatest specialists in the land were called to give evidence. In the result, the judge has found that what happened was this: In October, 1947, a spinal anaesthetic was in use at the hospital called nupercaine. It was a liquid supplied by the makers in closed glass ampoules. These were test tubes sealed with glass. When the time came to use it, a nurse filed off the glass top, the anaesthetist inserted his needle and drew off the nupercaine, which he then injected into the spine of the patient. It so happened that in this process there was some risk of the needle becoming infected. The reason was because the outside of the ampoule might become contaminated with a germ of some kind: and the needle might touch it as the anaesthetist was filling it. That this risk was a real one is shown by the fact that quite a number of cases became complicated by some infection or other.

In order to avoid this risk, the senior anaesthetist at the hospital, Dr. Pooler, decided to keep the ampoules in a jar of disinfectant called phenol, which was a form of carbolic acid. This disinfectant was made in two strengths. The stronger was tinted light blue and the weaker was tinted pale red. This was so as to distinguish it from water. Following Dr. Pooler, the junior anaesthetist, Dr. Graham, thought that it was a good thing to disinfect the ampoules in this way and he adopted the same system. By a great misfortune this new system of disinfecting had in it a danger of which Dr. Pooler and Dr. Graham were quite unaware. The danger was this: the ampoules in the jar might become cracked; the cracks might be so fine or so placed that they could not be detected by ordinary inspection, and the carbolic disinfectant would then seep through the cracks into the nupercaine, and no one would realize that it had taken place. Thus the anaesthetist, who thought he was inserting pure nupercaine into the spine of the patient, was in fact inserting nupercaine mixed with carbolic acid. That is the very thing which happened in the case of these two men. Carbolic acid was inserted into their spines and corroded all the nerves which controlled the lower half of their bodies

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[9] [1951] 2 K.B. 343.

[10] [1953] 1 W.L.R. 1472.

That is the explanation of the disaster, and the question is: were any of the staff negligent? I pause to say that once the accident is explained, no question of res ipsa loquitur arises. The only question is whether on the facts as now ascertained anyone was negligent. Mr. Elwes said that the staff were negligent in two respects: (1) in not colouring the phenol with a deep dye; (2) in cracking the ampoules. I will taken them in order: (1) The deep tinting. If the anaesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection they would no doubt have dyed the phenol a deep blue; and this would have exposed the contamination. But I do not think that their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here. Dr. Graham sought to escape the danger of infection by disinfecting the ampoule. In escaping that known danger he unfortunately ran into another danger. He did not know that there could be undetectable cracks, but it was not negligent for him not to know it at that time. We must not look at the 1947 accident with 1954 spectacles. The judge acquitted Dr. Graham of negligence and we should uphold his decision.

(2) The cracks. In cracking the ampoules, there must, I fear, have been some carelessness by someone in the hospital. The ampoules were quite strong and the sisters said that they should not get cracked if proper care was used in handling them. They must have been jolted in some way by someone. This raises an interesting point of law. This carelessness was, in a sense, one of the causes of the disaster; but the person who jolted the ampoule cannot possibly have foreseen what dire consequences would follow. There were so many intervening opportunities of inspection that she might reasonably think that if the jolting caused a crack, it would be discovered long before any harm came of it. As Somervell L.J. has pointed out, she herself would probably examine the ampoule for a crack, and seeing none, would return it to the jar. The anaesthetist himself did in fact examine it for cracks, and finding none, used it. The trouble was that nobody realized that there might be a crack which could not be detected on ordinary examination. What, then, is the legal position?

It may be said that, by reason of the decision of this court in *In re Polemis* [11] the hospital authorities are liable for all the consequences of the initial carelessness of the nurse, even though the consequences could not reasonably have been foreseen. But the decision in *In re Polemis* [11] is of very limited application. The reason is because there are two preliminary questions to be answered before it can come into play. The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct: see *Hay or Bourhill* v. *Young*,[12] *Woods* v. *Duncan*,[13] *per* Lord Russell and *per* Lord Porter.

The second question is whether the neglect of duty was a "cause" of the injury in the proper sense of that term; and causation, as well as duty, often depends on what you should

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[11] [1921] 3 K.B. 560; 37 T.L.R. 940.

[12] [1943] A.C. 92; [1942] 2 All E.R. 396.

[13] [1946] A.C. 401, 437; 62 T.L.R. 283; [1946] 1 All E.R. 420n.

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foresee. The chain of causation is broken when there is an intervening action which you could not reasonably be expected to foresee: see *Woods* v. *Duncan*,[14] *per* Lord Simon, Lord Macmillan, and Lord Simonds. It is even broken when there is an intervening omission which you could not reasonably expect. For instance, in cases based on *Donoghue* v. *Stevenson* [15] a manufacturer is not liable if he might reasonably contemplate that an intermediate examination would probably be made. It is only when those two preliminary questions—duty and causation—are answered in favour of the plaintiff that the third question, remoteness of damage, comes into play.

Even then your ability to foresee the consequences may be vital. It is decisive where there is intervening conduct by other persons: see *Stansbie* v. *Troman*,[16] *Lewis* v. *Carmarthenshire County Council*.[17] It is only disregarded when the negligence is the immediate or precipitating cause of the damage, as in *In re Polemis* [18] and *Thurogood* v. *Van den Berghs & Jurgens Ld.*[19] In all these cases you will find that the three questions, duty, causation, and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same problem. Starting with the proposition that a negligent person should be liable, within reason, for the consequences of his conduct, the extent of his liability is to be found by asking the one question: Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it: but otherwise not.

Even when the three questions are taken singly, they can only be determined by applying common sense to the facts of each particular case: see as to duty, *King* v. *Phillips*,[20] as to causation, *Stapley* v. *Gypsum Mines Ld.*,[21] *per* Lord Reid; and as to remoteness, *Liesbosch, Dredger* v. *Edison S.S. (Owners)*,[22] *per* Lord Wright. Instead of asking three questions, I should have thought that in many cases it would be simpler and better to ask the one question: is the consequence within the risk? And to answer it by applying ordinary plain common sense. That is the way in which Singleton L.J. and Hodson L.J. approached a difficult problem in *Jones* v. *Livox Quarries Ld.*,[23] and I should like to approach this problem in the same way.

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[14] [1946] A.C. 421, 431, 442.

[15] [1932] A.C. 562; 48 T.L.R. 494.

[16] [1948] 2 K.B. 48; 64 T.L.R. 226; [1948] 1 All E.R. 599.

[17] [1953] 1 W.L.R. 1439; [1953] 2 All E.R. 1403.

[18] [1921] 3 K.B. 560.

[19] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[20] [1953] 1 Q.B. 429, 437, 443; [1953] 1 All E.R. 617. E.R. 617.

[21] [1953] A.C. 663 at p. 681; [1953] 2 All E.R. 478.

[22] [1933] A.C. 449 at p. 460; 49 T.L.R. 289.

Asking myself, therefore, what was the risk involved in careless handling of the ampoules, I answer by saying that there was such a probability of intervening examination as to limit the risk. The only consequence which could reasonably be anticipated was the loss of a quantity of nupercaine, but not the paralysis of a patient. The hospital authorities are therefore not liable for it.

When you stop to think of what happened in the present case, you will realize that it was a most extraordinary chapter of accidents. In some way the ampoules must have received a jolt, perhaps while a nurse was putting them into the jar or while a trolley was being moved along. The jolt cannot have been very severe. It was not severe enough to break any of the ampoules or even to crack them so far as anyone could see. But it was just enough to produce an invisible crack. The crack was of a kind which no one in any experiment has been able to reproduce again. It was too fine to be seen, but it was enough to let in sufficient phenol to corrode the nerves, whilst still leaving enough nupercaine to anaesthetize the patient. And this very exceptional crack occurred not in one ampoule only, but in two ampoules used on the self-same day in two successive operations; and none of the other ampoules was damaged at all. This has taught the doctors to be on their guard against invisible cracks. Never again, it is to be hoped, will such a thing happen. After this accident a leading textbook was published in 1951 which contains the significant warning: "Never place ampoules of local "anaesthetic solution in alcohol or spirit. This common practice "is probably responsible for some of the cases of permanent "paralysis reported after spinal analgesia." If the hospitals were to continue the practice after this warning, they could not complain if they were found guilty of negligence. But the warning had not been given at the time of this accident. Indeed, it was the extraordinary accident to these two men which first disclosed the danger. Nowadays it would be negligence not to realize the danger, but it was not then.

One final word. These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure. I agree with my Lord that these appeals should be dismissed.

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[23] [1952] 2 Q.B. 608 at pp. 613, 614, 618; [1952] 1 T.L.R. 1377.

MORRIS L.J. Surgical operations were successively performed on the two plaintiffs on October 13, 1947, at the Chesterfield and North Derbyshire Royal Hospital, which was then a voluntary hospital. In each case a spinal anaesthetic was administered by the same anaesthetist, nupercaine being injected into the theca by means of a puncture between lumbar vertebrae. In each case the nupercaine was aspirated from a glass ampoule, a separate ampoule being used (though the contents were not wholly used) for each patient. The glass ampoules containing the nupercaine, with others, had been kept in a glass jar which contained phenol in a 1 in 40 solution: they had previously been immersed for about 20 minutes in phenol in a 1 in 20 solution. In the period following the operations each plaintiff developed a condition of spastic paraplegia. After a full and careful hearing the judge negatived the suggestion that the condition to which the plaintiffs became reduced should be attributed to the nupercaine itself. He came to the positive conclusion that the injuries were in fact caused by the injection of phenol with the nupercaine. The defendants did not seek to assume the burden of assailing on appeal this finding of fact. No criticism of the operating surgeons was at any time made in the proceedings. The Minister of Health was sued as the successor of the trustees of the hospital: the anaesthetist, Dr. Graham, was also sued. The manufacturers of the nupercaine were later joined as defendants but before the conclusion of the trial the case against them was dismissed with the concurrence of counsel for the other parties.

The evidence adduced at the hearing showed that it was only in very rare cases that any untoward consequence followed upon spinal anaesthetic injection. In the nature of things the plaintiffs could not know, nor be expected to know, exactly what took place in preparation for and during their operations. When they proved all that they were in a position to prove they then said "res ipsa loquitur." But this convenient and succinct formula possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely because it is expressed in

Latin. When used on behalf of a plaintiff it is generally a short way of saying: "I submit that the facts and circumstances which "I have proved establish a prima facie case of negligence against "the defendant." It must depend upon all the individual facts and the circumstances of the particular case whether this is so. There are certain happenings that do not normally occur in the absence of negligence, and upon proof of these a court will probably hold that there is a case to answer. (For a valuable discussion of this topic see an article by Dr. Ellis Lewis: 1951, 11 Cambridge Law Journal, p. 74.)

Where there are two or more defendants it may be that the facts proved by a plaintiff are such as to establish a prima facie case against each defendant. Thus in *Mahon* v. *Osborne*[24] MacKinnon L.J. said: "Five persons were concerned in the operation "on March 4: Mr. Osborne (the surgeon), the anaesthetist, Nurse "Ashburner (as chief, or theatre, nurse), Nurse Edmunds, and "Nurse Callaghan. The plaintiff, having no means of knowing "what happened in the theatre, was in a position of being able "to rely on the maxim res ipsa loquitur so as to say that some "one or more of these five must have been negligent, since the "swab was beyond question left in the abdomen of the deceased. "In fact, she sued Mr. Osborne, the surgeon, and Miss Ashburner, the chief nurse, alleging that one or other of them, or "perhaps both, must have been negligent. But it was for the "plaintiff to establish her case against either or both."

Difficulties may arise, however, if a plaintiff only proves facts from which the inference is that there may have been negligence either in defendant A or in defendant B. So in the present case it was said that unless Dr. Graham was the servant or agent of the hospital the position at the close of the plaintiffs' cases was that if a prima facie case of negligence was established it was merely a case that pointed uncertainly against either Dr. Graham or the hospital. I do not think that it is necessary to consider whether, if Dr. Graham was not the servant or agent of the hospital and if no evidence at all had been called on behalf of the defendants, it could have been asserted that a prima facie case was made out both against Dr. Graham and against the hospital, for I have come to the conclusion that Dr. Graham was the servant or agent of the hospital.

In *Gold* v. *Essex County Council*[25] Lord Greene M.R. pointed out that in cases of this nature the first task is to discover the extent of the obligation assumed by the person whom it is sought to be made liable. He added: "Once this is discovered, it follows "of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another "person, whether a servant or agent, to discharge it on his "behalf, and this is equally true whether or not the obligation "involves the use of skill." In the present cases the judge held that both plaintiffs were contributors for hospital and surgical treatment under a contributory scheme run by the hospital, so that they made some contributions which were received by the hospital for their treatment. The exact details of the scheme which the hospital had run were not before us and they might not have added materially to the facts proved. While the requisite standard of care does not vary according as to whether treatment is gratuitous or on payment, the existence of arrangements entitling the plaintiffs to expect certain treatment might be a relevant factor when considering the extent of the obligation assumed by the hospital.

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[24] [1939] 2 K.B. 14, 38.

[25] [1942] 2 K.B. 293, 301.

In his judgment in *Gold* v. *Essex County Council* Lord Greene analysed the position of the various persons in the "organization" of the hospital to which the plaintiff in that case resorted for free advice and treatment. He said[26]: "The "position of the nurses again . . . if the nature of their employment, both as to its terms and as to the work performed, is "what it usually is in such institutions I cannot myself see any "sufficient ground for saying that the defendants do not undertake towards the patient the obligation of nursing him as distinct from the obligation of providing a skilful nurse." This passage conveniently demonstrates a contrast. A hospital might assume the obligation of nursing: it might on the other hand merely assume the obligation of providing a skilful nurse. But the question as to what obligation a hospital has assumed becomes, as it seems to me, ultimately a question of fact to be decided having regard to the particular circumstances of each particular case: the ascertainment of the fact may require in some cases inference or deduction from proved or known facts. In the present case we are concerned only with the position of Dr. Graham in 1947 in this voluntary hospital.

The general position in regard to nurses would appear to be reasonably uniform and clear. In *Gold's* case Lord Greene said[27]: "Nursing, it appears to me, is just what the patient is

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[26] [1942] 2 K.B. 302.

[27] Ibid.

"entitled to expect from the institution, and the relationship of "the nurses to the institution supports the inference that they "are engaged to nurse the patients. In the case of a nursing "home conducted for profit, a patient would be surprised to be "told that the home does not undertake to nurse him. In the "case of a voluntary hospital with the usual nursing staff his "just expectation would surely be the same. The idea that "in the case of a voluntary hospital the only obligation which "the hospital undertakes to perform by its nursing staff is not "the essential work of nursing but only so-called administrative "work appears to me, with all respect to those who have thought "otherwise, not merely unworkable in practice but contrary to "the plain sense of the position." On the principles so clearly enunciated the court in that case held that the hospital had assumed the obligation of treating a patient who sought treatment by Grenz rays and of giving the treatment by the hand of a competent radiographer. That was the natural and reasonable inference to be drawn from the way in which those running the hospital conducted their affairs and from the nature of the engagement of the radiographer.

If a patient in 1947 entered a voluntary hospital for an operation it might be that if the operation was to be performed by a visiting surgeon the hospital would not undertake, so far as concerned the actual surgery itself, to do more than to make the necessary arrangements to secure the services of a skilled and competent surgeon. The facts and features of each particular case would require investigation. But a hospital might in any event have undertaken to provide all the necessary facilities and equipment for the operation and the obligation of nursing and also the obligation of anaesthetizing a patient for his operation. The question in the present case is whether the hospital undertook these obligations. In my judgment they did. There can be no doubt that they undertook to nurse the plaintiffs and to provide the necessary facilities and equipment for the operations. I think they further undertook to anaesthetize the plaintiffs. The arrangements made between the hospital and Dr. Pooler and Dr. Graham, together with the arrangements by which a resident anaesthetist was employed, had the result that the hospital provided a constantly available anaesthetic service to cover all types of cases.

It is true that Dr. Pooler and Dr. Graham could arrange between themselves as to when they would respectively be on duty at the hospital: and each was free to do private work.

But these facts do not negative the view, to which all the circumstances point, that the hospital was assuming the obligation of anaesthetizing the plaintiffs for their operations. I consider that the anaesthetists were members of the "organization" of the hospital: they were members of the staff engaged by the hospital to do what the hospital itself was undertaking to do. The work which Dr. Graham was employed by the hospital to do was work of a highly skilled and specialized nature, but this fact does not avoid the application of the rule of "respondeat "superior." If Dr. Graham was negligent in doing his work I consider that the hospital would be just as responsible as were the defendants in *Gold* v. *Essex County Council* [28] for the negligence of the radiographer or as were the defendants in *Cassidy* v. *Ministry of Health.*[29] I have approached the present case, therefore, on the basis that the defendants would be liable if the plaintiffs' injuries were caused by the negligence either of Dr. Graham or by the negligence of someone on the staff who was concerned with the operation or the preparation for it. On this basis, if negligence could be established against one or more of those for whom the hospital was responsible, it would not matter if the plaintiffs could not point to the exact person or persons who had been negligent.

It was not suggested that Dr. Graham was negligent in using nupercaine, nor that there was anything faulty in the manner of his injecting. But it was said that the evidence pointed to the fact that the quantity of phenol which must have found its way into the nupercaine had passed through cracks of dimensions which would not have eluded a careful examiner. This view depended in part upon an estimate as to the percentage of phenol admixture which would be damaging and in part upon the evidence as to the results of experiments to ascertain the rate at which phenol might percolate through cracks. But it seems unlikely that Dr. Graham in two successive operations would fail to detect cracks which could be observed or felt. The judge, having seen and heard Dr. Graham, whose evidence he said was given "in a very careful and forthright manner," rejected the suggestion that Dr. Graham had failed to detect cracks which could have been seen. I do not think that this finding can be disturbed, and, accordingly, the matter must be considered on the footing that phenol had found its way into the ampoules through cracks not ordinarily detectable. On this basis it is clear that if the phenol solution had been tinted with some vivid colouring any escape of the solution into the ampoules would have been readily apparent. This was at all times frankly conceded by Mr. Hylton-Foster. The question arises whether Dr. Graham was negligent in not arranging for the deep-tinting of the phenol solution. The phenol solution as used in the hospital was in fact coloured, though not vividly. This colouring was part of the routine adopted in the hospital to denote and to identify phenol.

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[28] [1942] 2 K.B. 293.

[29] [1951] 2 K.B. 343.

It was Dr. Pooler who first introduced in the hospital the system of immersing the ampoules in phenol solution. Dr. Graham considered the matter for some time before he followed the lead given him by his senior and more experienced colleague, upon whose opinion he greatly relied. When Dr. Graham adopted the new method he realized full well, as he unhesitatingly admitted, that if a glass ampoule became cracked there could be resultant percolation of phenol solution which would be a "terribly serious danger." It was for that reason that he felt it necessary, after changing over to the new method, to examine carefully for cracks. But Dr. Graham was most emphatic in his evidence that in 1947 he had no knowledge at all that there might be in an ampoule some kind of a crack which was not visible but which yet permitted percolation. He firmly believed that there was no danger provided that there was no crack that could be seen on proper inspection: he never conceived the idea of a crack that he could not see. I read his evidence, when taken in its entirety, as showing that he was not relying upon seeing some discolouration as a warning that there had been percolation, but that he was convinced that danger could only arise if there was a crack that could be seen and that such danger could be fully averted by careful inspection.

It is now known that there could be cracks not ordinarily detectable. But care has to be exercised to ensure that conduct in 1947 is only judged in the light of knowledge which then was or ought reasonably to have been possessed. In this connexion the then-existing state of medical literature must be had in mind. The question arises whether Dr. Graham was negligent in not adopting some different technique. I cannot think that he was. I think that a consideration of the evidence in the case negatives the view that Dr. Graham was negligent and I see no reason to differ from the conclusions which were reached on this part of the case by the judge. But it is further said that there must have been negligent mishandling of the ampoules on the part of some member or members of the staff of the hospital. On behalf of the plaintiffs it was urged that the ampoules must have arrived intact and in good order at the hospital and must have been carelessly handled at a later stage when they were being made ready and available for operative use. There was much evidence which supported the contention that ampoules could only have been damaged if they were mishandled. Even so, it is problematical as to when and where and under what circumstances these two ampoules became damaged. But as the case now stands an acceptance of the finding of fact of the judge that Dr. Graham carefully examined the ampoules used and that there were no cracks which would by such examination have been revealed, involves that the offending cracks were not detectable ones.

If the view is correct that an anaesthetist in 1947 was not negligent in not knowing of the risk of seepage through what have been called " invisible cracks " it follows, I think, that members of the theatre staff could not be expected to know of any such risk. In his speech in *Bolton* v. *Stone* [30] Lord Porter said: " It " is not enough that the event should be such as can reasonably " be foreseen: the further result that injury is likely to follow " must also be such as a reasonable man would contemplate, " before he can be convicted of actionable negligence." If some member of the staff had in fact mishandled the ampoules in question then the position was either that damage was not seen after an actual inspection or that an inspection would have been unavailing: since no detectable damage to them was caused there was no reason to foresee that there was any risk in leaving such ampoules amongst those from which an anaesthetist would select and no reason to contemplate that any injury would be likely to follow. Though there must be abiding sympathy with the two plaintiffs in their grievous and distressing misfortunes, I consider that the judgment of the judge was correct

Appeals dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester; Berrymans; Hempsons; Swepstones.*

A. W. G.

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[30] [1951] A.C. 850, 858; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

1954
Mar. 22.

Devlin J.

ALMA SHIPPING CO., S.A. *v.* V. M. SALGAONCAR E IRMAOS LTDA.

Shipping—Charterparty—Demurrage—" Average "—Dispatch money—Calculation—" Charterers to have right to average days allowed for "loading and discharging."

Judicial Precedent — Decision at first instance — Whether binding on other judge at first instance—Construction of commercial document.

Where a charterparty gives the charterers a right to " average " the days allowed for loading and discharging, the time on demurrage at the port of loading is set against the time saved at the port of discharge, or vice versa, and the payment of demurrage or dispatch money will depend on the net result.

Watson Brothers Shipping Co. Ld. v. *Mysore Manganese Co. Ld.* (1910) 26 T.L.R. 221; 15 Com.Cas. 159 applied.

Molière S.S. Co. Ld. v. *Naylor, Benzon & Co.* (1897) 13 T.L.R. 187; 2 Com.Cas. 92 distinguished.

ACTION.

The plaintiffs were at all material times the owners of the *s.s. Alma.* By a charterparty dated December 17, 1952, between Faros Shipping Co. Ld., on behalf of the owners, and William Shyvers Ld., on behalf of the charterers, the charterers chartered the *Alma* to load a full and complete cargo of iron ore, say 7,000 tons, 10 per cent. more or less at captain's option, at Mormugao and to deliver the same at Rotterdam.

Loading began at Mormugao on January 16, 1953, and finished on February 10, 1953, and discharge at Rotterdam began on March 25 and was completed on March 26. There were no holidays or non-working days (apart from periods from noon on Saturdays to 8 a.m. on Mondays) and no interruptions due to excepted perils during either loading or discharge.

The quantity of cargo loaded at Mormugao was 7,475 tons, and in accordance with clause 5 of the charterparty the time allowable for the separate operations of loading and discharging, without prejudice to the parties' contentions as to the effect of clause 9 of the charter, was

(a) for loading ... $\frac{7,475}{500}$ = 14 days 22 hours 48 minutes

(b) for discharging ... $\frac{7,475}{1,500}$ = 4 days 23 hours 36 minutes

By clause 9 of the charter it was provided " Charterers to " have the right to average the days allowed for loading and " discharging." The charterers exercised that right and claimed that they were entitled to be paid dispatch money under the charter amounting to £431 3s. 3d. (calculated according to method " B " below).

The owners denied that the charterers were entitled to be paid dispatch money and claimed that they (the owners) were entitled to be paid demurrage under the charter amounting to £54 6s. 9d. (calculated according to method " A " below).

It was agreed between the parties that an alternative method of calculation to " A " and " B " was method " C " (below) whereby the charterers would be entitled to dispatch money amounting to £201 19s. 11d.

Method " A."

	D.	H.	M.
Time used in loading	19	4	0
Time allowed for loading	14	22	48
Demurrage (loading)	4	5	12
Time allowed for discharge	4	23	36
Deduct excess time at loading port	4	5	12
Actual time left for discharge		18	24
Time used in discharging		23	37
Time allowed for discharge		18	24
Demurrage (total)		5	13

Total demurrage 5 hours 13 minutes at £250 per day = £54 6s. 9d. (Balance of freight account due to owners £370 17s. 2d.)

Method " B."

	D.	H.	M.
Time allowed.			
For loading	14	22	48
For discharging	4	23	36
Averaged lay time	19	22	24
Time used (loading and discharging)	16	11	37
Time saved	3	10	47

Dispatch money on 3 days 10 hours 47 minutes at £125 per day = £431 3s. 3d. (Balance of dispatch money due to charterers £114 12s. 10d.)

Method "C."

	D.	H.	M.
(1) *Loading.*			
Time on demurrage at loading port (as in method "A")	4	5	12
(2) *Discharge.*			
Time saved to ship, continuous from 22.45 on March 26 to 18.44 on April 1	5	19	59
Deduct time on demurrage at loading port ...	4	5	12
Net time saved	1	14	47

Dispatch money on 1 day 14 hours 47 minutes at £125 per day = £201 19s. 11d. (Balance of freight account due to owners £114 10s. 6d.)

Subject to the charterers' right to set off against the agreed balance any such amount as the court might hold to be due to the charterers as dispatch money, it was agreed that there was due from the charterers to the owners as the balance of the freight the sum of £316 10s. 5d.

The question for the decision of the court was which of the three methods of calculation was, on the true construction of the charter, the correct method.

T. G. Roche for the owners. Method "A" should be adopted. The way to view the position is to regard the charterers as having an "overdraft" on the lay days at the port of loading which has to be deducted from the time allowed for discharge so as to arrive at the proper time left at the port of discharge.

Although in *Molière Steamship Co. Ld.* v. *Naylor, Benzon & Co.*,[1] in which a similar clause was included, Kennedy J. held that the charterers might add together at the port of loading the days allowed for loading and discharging, he did so on the strength of the evidence called to show that such a method had been accepted for a number of years, but he expressed doubt whether, in the absence of such evidence of custom, he would have decided as he did.

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[1] (1897) 2 Com.Cas. 92; 13 T.L.R. 187.

In *Watson Brothers Shipping Co. Ld.* v. *Mysore Manganese Co. Ld.*[2] a clause provided: " Days to be averaged over all " voyages performed under and during the entire currency of this " charter to avoid demurrage," and Hamilton J. adopted the equivalent of method " C," but although method " C " might be appropriate in the *Watson* case,[2] there the words " days allowed " were not used, and it is only by adopting method " A " that effect can be given to those words by taking into account the time allowed for loading, setting that off against the actual time taken and deducting the difference, if any, from the time allowed for discharging. Method " B " is in any event wrong and, if method " A " is not adopted, method " C " should be adopted as in the *Watson* case.[2]

Basil Eckersley for the charterers. Method " B " should be adopted on the authority of the *Molière* case.[3] Further support for method " B " is provided by *Rederiaktiebolaget Transatlantic* v. *La Compagnie Française des Phosphates de l'Oceanie*,[4] which is authority for the proposition that averaging and reversible provisions produce the same result. It is also clear authority that method " A " is wrong because that method falls into the error rejected by Scrutton L.J.[5] that it does not deduct days of the same quality for the purpose of averaging, i.e., Sundays and non-weather working days are excluded in the discharging time. Wherever there is a right to " pool " loading and discharging days no calculation which allows deduction of days of different quality should be permitted.

It is conceded that *Watson's* case[6] is authority for method " C," at least so far as the charterparty in that case was concerned, but the words there were not precisely the same as the present. There the words were " Days to be averaged over all " voyages performed . . . to avoid demurrage." That clause gave no option to average and, therefore, the reasoning of Hamilton J. in that case had not the same force.

Both Carver's Carriage of Goods by Sea, 9th ed., p. 896, and Scrutton on Charterparties, 15th ed., p. 344, support method " B " as the method of calculation when a clause gives liberty to average, and in both those books the *Molière* case[7] is cited as authority. In *Watson's* case [8] the *Molière* case [9] was not cited, and the decision in the former case might have been different if the latter had been cited. The basis of calculation in the *Molière* case [9] is more satisfactory, first, because it is simple and straightforward, and, secondly, because that basis is the only one which really achieves the plain commercial purpose of the clause. Therefore the *Molière* case [9] should be followed in preference to *Watson's* case.[10] [Reference was also made to *Love and Stewart* v. *Rowtor S.S. Co.*[11]]

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[2] (1910) 15 Com.Cas. 159; 26 T.L.R. 221.

[3] 2 Com.Cas. 92.

[4] (1926) 32 Com.Cas. 126.

[5] Ibid. 132.

[6] 15 Com.Cas. 159.

[7] 2 Com.Cas. 92.

DEVLIN J. This case turns entirely upon the construction of clause 9 in a charterparty, which provides: "Charterers to have "the right to average the days allowed for loading and dis-"charging." "The days allowed," of course, refer to the lay days for loading and discharging. There is no difficulty about computing the lay days because the computation is agreed. Computed according to the method which is described in the charterparty (that is, by rates of loading per day) they are agreed at almost 15 days for loading and almost 5 days for discharging—I will call them, for the sake of simplicity, 15 and 5. The reason why they are different is because the charterers are expected under the lay day clause to discharge three times as fast as they are expected to load; it may be because of better facilities at the discharge port, Rotterdam, as compared with the loading port, Mormugao, but at any rate so it is.

The differences which have arisen between the parties as to whether demurrage is payable, and, if so, what amount, and whether dispatch money is payable, relate therefore not to the calculation of lay days but to the way in which the time used is to be related to the lay days; and what has given rise to divergence is the clause which I have read.

It is clear that, unless there is some clause of this sort, the operations of loading and discharging have to be considered quite separately. The lay days have to be calculated separately, and the time used has to be considered against each separately and demurrage and dispatch money arrived at accordingly. The object of a clause of this kind is to prevent the two from being considered separately and to allow the charterer in this part of the clause, since the option is with him, to avail himself, if he wants to, of days saved in loading so as to advantage himself in the discharging, or vice versa. These clauses, the authorities

[8] 15 Com.Cas. 159.

[9] 2 Com.Cas. 92.

[10] 15 Com.Cas. 159.

[11] [1916] 2 A.C. 527.

show, adopt various forms. The use of the word "average" is very common; the use of the word "reversible" is also common; and sometimes there is a clause which simply provides, quite clearly and simply, for the addition of the two lots of lay days together.

Three methods of operating the clauses have been advanced. The simplest of them is the one which is advanced by the charterers and is called method "B." That simply means that one adds the two lots of lay days together, making approximately 20 days, and one takes the total time used, and the difference between them one way or the other produces the results. That is not, in any strict sense of the term, "averaging"; it is aggregating, or pooling the two lots of periods and pooling the results. One can get at the same result by averaging if, say, instead of taking 20 days for the whole one took 20 days divided by two, the average for loading and discharging would be 10 and one gives oneself 10 days at each place. At first sight, one would think that it could not matter which way one set about it, but in fact it does. The reason why it matters, and the reason why all three methods of calculation produce different results, is because the time used does not flow smoothly and uninterruptedly; it is interrupted by Sundays, half-holidays and other non-working days, and it is, so to speak, the interjection of these into the period which is actually used that causes different results to be produced by these different methods of calculation. What might be regarded as the stricter way of doing it by averaging (that is, dividing the aggregate by two) would, I am told, produce quite a different result and is not in fact a method that is relied upon by either side in this case.

The principal method upon which the owners rely is method "A." Upon that basis one takes the time by which the time used exceeded the lay days at the port of loading—it might, of course, be less, but on the particular facts of this case it happens to have exceeded it, and exceeded it by something over four days—and one deducts that excess from the lay days fixed at the port of discharge. The result of that, of course, is to diminish the lay days for discharging and one then puts the time actually used at discharging against that diminished amount of lay days. If time is saved on loading, then that is added to the lay days allowed for discharging in the same way.

The third method (which has been called method "C") is one which is advanced in the alternative by the owners and accepted, though with considerable reluctance, by the charterers as an alternative method if their method "B" is not allowed. There the two calculations are kept entirely separate until the very end when a balance is struck. If time is saved on discharge that is set against the excess time of loading, or vice versa, and in that way a net result is arrived at.

The matter is not free from authority, because clauses of this type are not uncommon. The first authority to which I have been referred in which a clause providing for "averaging" was considered by a court is *Molière Steamship Co. Ld.* v. *Naylor, Benzon & Co.*[1] That was a judgment of Kennedy J. The material words in the charterparty were: "Charterers to be at liberty to "average the days for loading and discharging in order to avoid "demurrage." It is sufficient to say about the judgment that it supports the charterers' view in the present case; it supports method "B" if the position is rightly summarized in the headnote. The headnote reads: "Where a charterparty gives "liberty to the charterers 'to average the days for loading and "'discharging in order to avoid demurrage,' the charterers may "add together at the port of loading the days allowed for the "two operations of loading and discharging, and the ship does "not come on demurrage till the days so added together are "exhausted." But when one examines the judgment, as Mr. Roche has done, it is plain that Kennedy J. was influenced by considerations other than the mere construction of the words. The report says that evidence was called in respect of the defendants' system of calculation, and Kennedy J. said[2]: "From the evidence called on behalf of the defendants it appears "that during a period of ten years the clause has been in common "use, and that during that time it has had an accepted meaning, "on the basis of which settlements have been made without "objection—that meaning being the one now put forward by "the defendants. It seems to me that I ought to act upon that "evidence. Apart from that understood meaning, the words "'to average the days' appear to me to be not very apt and to "be open to argument. I do not say that without the evidence "called by the defendants their construction of the words would "be an impossible one, but it would certainly be doubtful whether "it was correct."

So what the judge is saying there is that he doubts very much whether the construction which he puts on the words is the correct one if he had been looking simply at the words themselves, but he felt it better in that case, because he thought the clause was ambiguous, to be guided by the evidence which he had heard. In those circumstances I feel that the headnote is a little misleading because it gives the impression, or might give the impression, that the judge had arrived at his conclusion as a matter of construction, which is not the case.

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[1] (1897) 2 Com.Cas. 92; 13 T.L.R. 187.

[2] 2 Com.Cas. 92, 99.

The next authority is a decision of Hamilton J. in *Watson Brothers Shipping Co. Ld.* v. *Mysore Manganese Co. Ld.*[3] There the wording was a little different. It was a charterparty which apparently provided for a number of voyages, though in fact only one voyage took place under it, and the words used in clause 5 of the charterparty were: "Days to be averaged over all voyages "performed under and during the entire currency of this charter "to avoid demurrage." The decision of Kennedy J. to which I have just referred was not, so far as appears from the report, discussed in the argument or in the judgment. Hamilton J. said[4]: "The defendants then contend that they are entitled to "take 10 days for the loading, and add to that 10 days for dis-"charging, and interpret them as 20 clear working days of 24 "hours as they would be interpreted under the circumstances "of the port of Marmagoa, and they say this is the meaning of "the provision 'days to be averaged over all voyages performed "'under and during the entire currency of this charter to avoid "'demurrage'"—that is method "B" in the present case. "There are other provisions with regard to demurrage in this "charterparty which throw a little light upon it, but I think the "real question turns on what is meant by the word 'average.'" Then he considered some of the other provisions of the charterparty, and he then said: "All these provisions show that the "business men who entered into this charterparty contemplated "that at the time the vessel was loaded at Marmagoa it would "be possible then to know whether she was on demurrage or "not, so that they would be able to exercise a lien for that "demurrage or pay the commissions mentioned. It is, perhaps, "technically a sufficient answer to say that some application "might be given to those words in the event of the vessel being "more than 20 days on demurrage at the port of loading, so that "in no possible event, and in no kind of averaging, could there "fail to be demurrage due and payable, but, still, it does show "that the shipper is trying to get a good deal out of the words

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[3] (1910) 15 Com.Cas. 159; 26 T.L.R. 221.

[4] 15 Com.Cas. 159, 166.

" 'days to be averaged over all voyages,' when he claims that he "is entitled to say his ship is not on demurrage at Marmagoa "until more than 20 of the charterparty days have expired, and "yet she is not loaded. I think the words 'days to be averaged "'over all voyages' will not bear this interpretation. Parties "often stipulate, and the parties could have stipulated, that so "many days are to be allowed for loading and discharging. The "other form of averaging days over the voyage or voyages to "avoid demurrage carries a different meaning. In my opinion "the meaning of the average clause is that a number of days for "shipment having been stipulated, and then a number of like "days for discharge having been stipulated, the vessel's right to "demurrage must be determined upon the events which happen "at the port of loading and according to the number of days "allowed for loading there, though subsequent events at the "port of discharge may entitle the charterers to abate the "amount of demurrage incurred at the port of loading by taking "credit for the number of days saved, if any, at the port of "discharge. The plaintiffs admit that two days were saved at "the port of discharge, the defendants claim three, but my view "is that, as a matter of construction at the end of ten charter-"party days for loading at Marmagoa, the vessel was on "demurrage." There he adopts method "C."

Mr. Eckersley put forward the view that the decision of Hamilton J. in that case is distinguishable, on the terms of the charterparty, from that which I have to decide today. I do not think it is. I observe that Hamilton J. put the real question which he had to determine as turning on what was meant by the word "average." It is plain that he has chosen between method "B," which the defendants there were advancing, and the method which he pronounced in favour of, which is method "C." He said particularly in referring to method "B": "I think the "words will not bear this interpretation," and then he adopted method "C." Once one has ascertained the number of days for shipment and the number of like days for discharge they become just as if they were days stipulated in the charterparty, so his reasoning exactly applies.

One other authority which was cited to me was *Rederiaktiebolaget Transatlantic* v. *La Compagnie Française des Phosphates de l'Oceanie.*[5] There the clause which the Court of Appeal had to construe was a straightforward one providing in terms: "At

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[5] (1926) 32 Com.Cas. 126.

"the charterers' option any days or parts of days not consumed "in loading may be added to the time for discharging, and any "extra time consumed in loading may be deducted from the time "for discharging." I do not think that the judgment of Scrutton L.J., which was referred to by Mr. Eckersley—although it has some helpful observations about the general way in which these clauses should be approached—really touches the clause in the present case and the meaning of the word "average" which I have to determine.

Mr. Eckersley quite rightly drew my attention to, and adopted as part of his argument, the references to this point in two of the leading textbooks, Scrutton on Charterparties, and Carver on Carriage by Sea. In Scrutton, 15th ed., p. 344, the editors sum up what they conceive to be the effect of the decisions in these words: "The clause 'to average the days "'for loading and discharging in order to avoid demurrage' "allows the charterer to add together the days agreed for both "operations, not being liable for demurrage till the total days "are exhausted." In Carver, 9th ed., p. 896, the author said: "Charterers sometimes stipulate for 'liberty to average the days "'for loading and discharging.' This was held in *Molière S.S.* "*Co. Ld.* v. *Naylor, Benzon & Co.*[6] to entitle them to add together "the time allowed for loading and the time allowed for discharging "and to exhaust the whole before demurrage could begin to run." It is, therefore, fair to say that in those words no distinction is drawn between the different forms of clause. No particular weight is put upon the use of the word "average," and they are all conceived as having the effect which the charterers in the present case urge that they should be given. But in neither of those books is the decision of Hamilton J. referred to, and in both of them the decision in the *Molière Steamship Co.* case[7] of Kennedy J. is treated as if it were an authority upon construction, whereas in fact I adopt Mr. Roche's submission that it cannot be so regarded.

In those circumstances I am left with the one authority which I think is clearly applicable, namely, the decision of Hamilton J. in the *Watson Brothers Shipping Co.* case,[8] and I can only decide in favour of the charterers by adopting their method "B" if I disagree with that decision. I am bound to say that if the matter were res integra a lot might be said for treating all these types of clauses as if they were intended to achieve the same

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[6] 2 Com.Cas. 92.

[7] Ibid.

[8] 15 Com.Cas. 159.

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thing, whether the words used were "averaging," "adding" or "reversible," but in the face of that decision, which clearly distinguishes between the clauses which use the word "average" and clauses which use the word "adding" or have a similar effect to using the word "adding," I do not conceive that I can do so. If it were a decision given by a judge speaking with no greater authority than my own, I should still in the circumstances of the present case think it right to follow it, because nothing can be more unfortunate in my judgment than that different shades of meaning in clauses of this type should be introduced by different judges, thus leading to a multiplicity of authorities; but coming as it does from Hamilton J., one speaking with great authority, it gives such added weight to it that in my judgment it would be wrong for me to disregard it.

In those circumstances, therefore, I reject method "B" and I reach the conclusion that a distinction must be drawn when the word "average" is used in a clause of this type from a clause which, though no doubt with similar intent, is phrased so as to use other terms which are quite as commonly used.

I am left therefore to distinguish between method "A" and method "C." There is, as I have said, no authority in favour of method "A." There is nothing to show that it was actually considered by Hamilton J., but there is no doubt that he pronounced in favour of method "C" or that that was the one which he adopted.

Mr. Roche has argued that that can be distinguished having regard to the words in the present clause, "days allowed." He submits that method "A" gives effect to those words, whereas method "C" is really only an accounting operation at the end of the whole thing; it does not operate on the days allowed either at one place or the other place, but merely balances the results of the two calculations at the end. I do not think that that distinction is one which ought to operate upon my mind. I attach great importance to there being, not more authorities, but the reverse in matters of this kind. If it were possible to give one common meaning to all these clauses I feel that there would be a great deal of advantage in so doing. For the reasons I have given I cannot go as far as that, but I certainly do not think that I ought to allow slight differences of wording to give rise to somewhat subtle reasoning so as to produce different results according to only slightly different formations of words. I therefore adopt the judgment of Hamilton J. in its entirety as governing this case, and accordingly I adopt method "C" as being the

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method that is produced by the right construction of this clause. The consequence of that is agreed between the parties. There is a balance of credit which has to be taken into account. The result is that it is agreed that there should be judgment for the owners for £114 10s. 6d., and I give judgment accordingly.

Judgment for the owners.

Solicitors: *Stokes & Mitcalfe; Sinclair, Roche & Temperley.*

J. D. P.

REGINA *v.* McCARTHY.

C. C. A.

1954 *Apr. 12; May 3.*

Lord Goddard C.J., Hallett and Pearson JJ.

Criminal Law — Murder — Provocation — Drunkenness — Accused "the "worse for drink" — Killing by repeated acts of violence after indecent assault on accused—Extent to which drunkenness may be taken into account in considering provocation.

The appellant killed a man by knocking him down and beating his head on a rough and stony road, fracturing his skull in several places. At his trial for murder, the appellant alleged in his defence that the deceased assaulted him and invited him to commit a homosexual offence, and that he was the worse for drink when he attacked the deceased. The judge directed the jury that, in considering the question of provocation, they were not entitled to take into account the fact that the accused was the worse for drink (if they found that he was) and consequently might be more excitable and liable to lose his self-control if provoked, and that, whether the accused was the worse for drink or not, the test to be applied was whether a reasonable person, in consequence of the provocation received, could be driven through transport of passion and loss of self-control to the degree and method and continuance of violence which produced the death. The appellant was convicted. On appeal against conviction, on the ground of misdirection as to the law of provocation and its application to the appellant's defence:—

Held, (1) that, on the facts, whether or not the appellant was drunk or sober, the provocation would not have justified repeated acts of violence although it would have excused a single blow.

(2) That unless a man was in such a complete state of intoxication as to make him incapable of forming the intent charged, drunkenness which might lead him to attack another in a manner which no reasonable sober man would do could not be pleaded as an excuse reducing the crime of murder to manslaughter if death

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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resulted. Accordingly, the judge had accurately directed the jury as to the law and the appellant was rightly convicted.

Principles in *Director of Public Prosecutions* v. *Beard* [1920] A.C. 479; 36 T.L.R. 379; *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272, and *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124 applied.

APPEAL against conviction.

The appellant, Michael Dennis McCarthy, was convicted at Carmarthen County Assizes on March 18, 1954, of the murder of Stanley Rees on December 4, 1953.

The following statement of facts is taken substantially from the judgment:—On the night in question the appellant, who had undoubtedly had a considerable amount of drink, got off a bus in which he had been riding and in which Rees was also a passenger and went some little way with him. The appellant turned up a side road, the surface of which was rough and stony, and on that road Rees was found by a neighbour lying dead. His skull was fractured in three or four places and his face was badly injured. The case for the prosecution was that the appellant had knocked Rees down and beat his face or head on the surface of the road, thereby causing severe injuries. When the appellant was interviewed by the police as the man known to have been last in the company of Rees, he asserted that he had seen a car coming fast down the road, obviously intending to suggest that it was that car which knocked Rees down and killed him. The appellant afterwards altered his story and in his defence stated that he had gone up the side road to relieve himself, that Rees had there committed an indecent assault upon him and, on being pushed away, had invited the appellant to commit sodomy with him. This, the appellant said, so provoked him that he " went raging " and hit Rees, after which his memory was vague but he did admit that he remembered taking hold of the deceased's ears and bumping his head on the ground.

There was nothing to support the prisoner's allegation other than his own evidence and, having regard to the respective size and build of the two men, the story was at least improbable. The medical evidence was clear that the injuries from which the deceased man died could not have been caused by a single blow, but must have been caused by repeated acts of violence.

The judge directed the jury that if they were of opinion that the assault and invitation alleged were in fact made, those were acts which could in law constitute provocation, and the jury then had to consider whether in all the circumstances of the case they constituted provocation sufficient to reduce the crime from murder to manslaughter. He then directed the jury that they were not entitled to consider the fact that the accused was the worse for drink (if the jury found that he was) and consequently might be more excitable and liable to lose his self-control if provoked, and whether the accused was the worse for drink or not, the test to be applied was whether a reasonable person in consequence of the provocation received, could be driven through transport of passion and loss of self-control to the degree and method and continuance of violence which produced the death.

The appellant appealed against conviction on the certificate of the judge given in order that the court might consider whether the direction he gave to the jury was correct in law.

Elwyn Jones Q.C. and *A. T. Davies* for the appellant. The appellant gave evidence that he was provoked while he was in a drunken state and that as a result of the provocation and drunkenness he committed the attack which resulted in death. It is submitted that the judge's direction to the jury was incorrect in law and that they were entitled in considering the effect of the provocation to take into account the fact that the accused was drunk, if they found that he was. The second rule in *Director of Public Prosecutions* v. *Beard* [1] lays down the principle on which evidence of drunkenness is admissible and is applicable in this case.

[LORD GODDARD C.J. The third rule is important. It cannot be said that this appellant was in such a state of intoxication as to be incapable of forming an intent. Where provocation is alleged, the question for the jury to consider is the nature of the assault which caused the death. It has been laid down on the highest authority that the mode of resentment must bear some reasonable relationship to the provocation received. It would be serious to say that self-induced intoxication can excuse a man if he reacts more violently to provocation than would a sober man.]

It is suggested in Kenny's Outlines of Criminal Law, 16th ed., p. 53, para. 42 (5), that the law as to the relevance of intoxication to the defence of provocation is not clear, and that although the objective test, namely, the effect which the provocation would have on a reasonable man, has been applied by the courts in certain cases where the accused has been peculiarly sensitive and less able to control himself than the average man, thus depriving him of the defence of provocation, in other cases the temporary effect of alcohol in rendering a man more inflammable than an ordinary man has been taken into consideration as admitting the defence of provocation. It is admitted that the jury must consider the nature of the assault, but equally where there is drunkenness they ought to be reminded of it because where there is provocation and drunkenness the question is whether the act of violence was done in consequence of the provocation or not, and a drunken man is more easily excitable than a sober man: *Rex* v. *Thomas.*[2] The words of Lord Reading in *Rex* v. *Hopper*,[3] where there had been fighting and drinking, were to the effect that both those facts ought to be borne in mind by the jury because they tended to make the appellant lose control of himself at the critical moment. Those words indicate, that in cases involving loss of self-control, if there is drunkenness that fact ought to be put to the jury because a drunken man would be more susceptible to the passions raised by the provocation than a sober man. The same point was considered in *Rex* v. *Letenock.*[4] See also *Rex* v. *Mason*[5] and *Director of Public Prosecutions* v. *Beard.*[6] In the present case the judge completely excluded the element of drunkenness.

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[1] [1920] A.C. 479; 36 T.L.R. 379.

[LORD GODDARD C.J. The question was considered in *Rex* v. *Meakin,*[7] which was referred to by Lord Birkenhead L.C. in *Beard's* case.[8] In *Rex* v. *Meakin*[9] Alderson B. took the view that drunkenness might affect the jury's view of the intent but that the use of a deadly weapon showed the intent so clearly that the drunkenness of the accused could not alter it. Knocking a man down and beating his head on the ground is equivalent to using a deadly weapon as in *Meakin's* case.[9] Assuming that there was provocation which could cause a man to lose his self-control, how can that degree of violence be justified even if he were drunk? Have you considered *Mancini* v. *Director of Public Prosecutions*[10]?]

In *Rex* v. *Meakin*[11] there was no provocation, and that distinguishes it from the present case. Once there is provocation the jury are entitled to consider it, and if there is also drunkenness it ought not to be isolated. It is conceded that *Mancini* v.

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[2] (1837) 7 Car. & P. 817.

[3] [1915] 2 K.B. 431, 435; 31 T.L.R. 360.

[4] (1917) 12 Cr.App.R. 221.

[5] (1912) 8 Cr.App.R. 121.

[6] [1920] A.C. 479.

[7] (1836) 7 Car. & P. 297.

[8] [1920] A.C. 479.

[9] 7 Car. & P. 297.

[10] [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272.

[11] 7 Car. & P. 297.

Director of Public Prosecutions [12] lays down the test normally to be applied in considering whether the provocation in fact excuses the deed resulting in death, namely, the effect of the provocation on a reasonable man, but it is remarkable that although the court did not say in that case that juries when considering the violence used should have regard to special states of mind which might arise in cases of neurosis or psychosis, courts do seem so to have directed juries in the case of drunkenness, when it was considered that that fact should be borne in mind. Moreover, in *Mancini's* case [12] there was not the marriage of provocation and drunkenness that there is in the present case. Where a homosexual assault is made upon a man who happens to be drunk, the two things ought to be considered together. All the indications here are that through drunkenness the accused lost the mastery of his passions, and it is utterly artificial to say that in those circumstances the acts done in consequence of the provocation must be considered in the light of what a reasonable man would do. [Reference was also made to *Rex* v. *Carroll*,[13] *Rex* v. *Pearson*,[14] *Rex* v. *Gauthier* [15] and *Holmes* v. *Director of Public Prosecutions*.[16]]

H. Edmund Davies Q.C. and *Campbell Prosser* for the Crown were not called on.

April 12. LORD GODDARD C.J. We are dismissing this appeal, but in view of the importance of the case and the fact that textbook writers think that the law on the question raised in the appeal is in a state of doubt the court will give its reasons at a later date.

May 3. LORD GODDARD C.J., reading the judgment of the court, stated the facts and continued: In this case it might be enough to say that considering that the judge clearly directed the jury that, whether the prisoner was drunk or sober, the assault and invitation were of a nature which could amount to provocation in law, the only question for the jury was whether the violence used by the appellant as a result of the provocation could possibly be excusable, as it is undoubted law that the violence used must have some reasonable relation to the provocation. While this provocation would no doubt have excused (when we say " excused " we mean enough to reduce the killing to manslaughter) a blow, perhaps more than one, it could not have justified the infliction of such injuries as to cause three or four fractures of the skull and the beating of the man's head on a stony road. But as the question of how far drunkenness may be taken into account in considering whether the offence can be reduced from murder to manslaughter not infrequently arises and has been treated in some of the textbooks as a matter on which the law is not clear, we propose to consider whether the direction given by the judge accurately stated the law.

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[12] [1942] A.C. 1.

[13] (1835) 7 Car. & P. 145.

[14] (1835) 2 Lewin C.C. 144.

[15] (1943) 29 Cr.App.R. 113.

[16] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

For reasons which will appear later in this judgment we do not think that it is necessary nowadays to consider in detail many of the older cases bearing on the subject. One case often referred to is *Rex* v. *Thomas*,[1] where Parke B. in summing up to the jury said[2]: "Drunkenness may be taken into consideration in cases "where what the law deems sufficient provocation has been "given, because the question is, in such cases, whether the fatal "act is to be attributed to the passion of anger excited by the "previous provocation, and that passion is more easily excitable "in a person when in a state of intoxication than when he is "sober." But earlier in his charge he had said[3]: "Suppose, for "instance, a blow were given, and the party struck beat the "other's head to pieces by continued, cruel, and repeated blows; "then you could not attribute that act to the passion of anger, "and the offence would be murder." In *Regina* v. *Monkhouse*[4] Coleridge J. said to a jury[5]: "It is not enough that he was "excited or rendered more irritable, unless the intoxication was "such as to prevent his restraining himself from committing the "act in question, or to take away from him the power of forming "any specific intention." That case, however, was not approved by the House of Lords in *Director of Public Prosecutions* v. *Beard*.[6] Commenting upon *Regina* v. *Monkhouse*, Lord Birkenhead L.C. said[7]: "The appropriate question seemed to be whether "the prisoner was so intoxicated as to be entirely incapable of "forming the intent charged, that is, the intent to murder. The "words, 'unless the intoxication was such as to prevent his "'restraining himself from committing the act in question' are "not to be found in any other judicial direction and cannot in "my view be explained unless they were unscientifically used "with the object of indicating the defence of insanity." And he then quoted with approval *Regina* v. *Stopford*,[8] where Brett J.

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[1] (1837) 7 Car. & P. 817.

[2] Ibid. 820.

[3] Ibid. 819.

[4] (1849) 4 Cox C.C. 55.

[5] Ibid. 56.

[6] [1920] A.C. 479; 36 T.L.R. 379.

[7] [1920] A.C. 479, 498.

[8] (1870) 11 Cox C.C. 643.

said[9]: "If he was merely so drunk as to put himself in a "passion, drunkenness would be no excuse." In *Beard's* case[10] the House of Lords considered all the cases on the subject of drunkenness being regarded as an element which would reduce the crime of murder to manslaughter and stated their conclusions under three heads, the third of which seems to be applicable here—that evidence falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act. Reliance is sometimes placed on *Rex* v. *Hopper*,[11] where the real point decided by the court was that the defence of manslaughter should have been left to the jury, but in delivering the judgment Lord Reading did say[12]: "It has also to be borne in "mind, although upon this not much reliance can be placed, "that there had been much drinking, and the fact that there had "been a fight all tended to make the appellant lose control of "himself at the critical moment when he fired the rifle."

But at the present day we have the assistance not only of *Beard's* case[13] but of two other decisions of the House of Lords, namely, *Mancini* v. *Director of Public Prosecutions*[14] and *Holmes* v. *Director of Public Prosecutions*.[15] In *Mancini*[16] Viscount Simon L.C., in stating the opinion of the House, said[17]: "It is "not all provocation that will reduce the crime of murder to man-"slaughter. . . . The test to be applied is that of the effect "of the provocation on a reasonable man, as was laid down by "the Court of Criminal Appeal in *Rex* v. *Lesbini*,[18] so that an "unusually excitable or pugnacious individual is not entitled to "rely on provocation which would not have led an ordinary "person to act as he did. In applying the test, it is of particular "importance (*a*) to consider whether a sufficient interval has "elapsed since the provocation to allow a reasonable man time to "cool, and (*b*) to take into account the instrument with which "the homicide was effected, for to retort, in the heat of passion "induced by provocation, by a simple blow, is a very different "thing from making use of a deadly instrument like a concealed

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[9] 11 Cox C.C. 644.

[10] [1920] A.C. 479.

[11] [1915] 2 K.B. 431; 31 T.L.R. 360.

[12] [1915] 2 K.B. 435.

[13] [1920] A.C. 479.

[14] [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272.

[15] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

[16] [1942] A.C. 1.

[17] Ibid. 9.

[18] [1914] 3 K.B. 1116.

"dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter." In *Holmes* [19] the same Lord Chancellor said [20]: "The distinction, therefore, is between asking '*Could* the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?'"

We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. It may be that an excitable pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely upon his excitable state of mind if the violence used is beyond that which a reasonable, or as we may perhaps say, an average person would use to repel an act which can in law be regarded as provocation. No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury, and what no doubt would govern their opinion would be the nature of the retaliation used by the provoked person. If a man who is provoked retaliates with a blow from his fist on another grown man a jury may well consider, and probably would, that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation might well merit a blow with the fist. It would be quite another thing, however, if the person provoked not only struck the man, but continued to rain blows upon him or to beat his head on the ground, as happened in the present case and as the accused apparently did in the case of *Thomas* [21] to which we have referred above. In view of the three decisions of the House of Lords to which we have referred, it is in our opinion now settled that apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results. For these reasons we are of opinion that the direction given by the judge was correct and it is for these reasons that we have already dismissed the appeal.

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[19] [1946] A.C. 588.

[20] Ibid. 599.

[21] 7 Car. & P. 817.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

SHAVE v. ROSNER.

1954
May 6.

Lord Goddard C.J., Hilbery and Donovan JJ.

Road Traffic—Dangerous condition—User of motor vehicle in—Condition due to negligent repair by garage mechanics—Unwitting use on road by owner—Whether garage proprietor "caused" vehicle to be used on road in dangerous condition—"Causes or permits to be used"—Motor Vehicles (Construction and Use) Regulations, 1951 (*S.I.* 1951, *No.* 2101), *regs.* 72 (1), 101.

Causation. "Causes or permits."

By the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 72 (1): "Every motor vehicle . . . shall at all times be "in such condition . . . that no danger is caused . . . to any person ". . . on a road." By regulation 101 any person who "uses or "causes or permits to be used on any road a motor vehicle . . . "in contravention of . . . the preceding Regulations" commits an offence.

A motor van was left by the owner at a garage to have the brakes reshoed. Having carried out the work the mechanics replaced the wheels but failed to tighten sufficiently the hub nuts on one of the wheels and in consequence, after the garage proprietor had delivered the van to the owner, and when the owner was driving it on a public road, that wheel came off and injured a person on the pavement. The garage proprietor was charged with unlawfully causing the van to be used on the road in a dangerous condition contrary to regulations 72 (1) and 101:—

Held that, although the accident was due to the negligence of his servants, the garage proprietor was not the cause of the van being used on the road in a dangerous condition, as the word "causes" when found, as in regulation 101, in juxtaposition or contrast to "permits" involved some degree of control and direction, and the garage proprietor, having delivered the van to the owner, had ceased to have any control or dominion over it, and had done nothing which was the active cause of the owner thereafter taking the van on the road. The garage proprietor, therefore, was not criminally liable under the regulations.

Observations of Lord Wright in *Houston* v. *Buchanan* [1940] 2 All E.R. 179, 187; 1940 S.C.(H.L.) 17 applied.

CASE STATED by County of London justices sitting at Bow Street.

An information was preferred against the defendant that he on July 11, 1953, at King Street, Hammersmith, did unlawfully cause to be used on a road a motor vehicle, a part of the vehicle, the front nearside wheel, being in such condition that danger was caused to a person on a road contrary to regulations 72 (1) and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951.[1]

The following facts were proved or admitted before the justices.—On July 11, 1953, a Morris motor van was left at a garage, where the defendant carried on the business of a motor-car dealer and repairer, for the brakes to be reshoed. The brakes were reshoed by the defendant's workmen and the defendant drove the van from his garage and delivered it to the owner. The owner then drove the defendant back to the garage, testing the brakes himself. A little later on the same day the owner was driving the van in King Street, Hammersmith, when the front nearside wheel came off and knocked down and injured a woman walking on the pavement. The wheel came off because the hub nuts had not been properly fastened by the defendant's workmen when they replaced the wheels of the van after reshoeing the brakes.

On behalf of the prosecutor it was contended that the defendant, after his workmen had reshoed the brakes, handed over the van to the owner in the full knowledge and understanding that the owner would drive it on public roads believing that when the defendant delivered it to him it was in a roadworthy condition, and that, particularly because the owner drove the defendant back to his garage, the defendant therefore caused the vehicle to be used on a road and was guilty of the offence.

On behalf of the defendant it was contended that though he might well be liable civilly to the owner, he was not criminally responsible because he could not stop the driver or anyone else using the van, nor could he authorize anyone to use it and, therefore, could not cause the van to be used on a road that afternoon.

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[1] Motor Vehicles (Construction and Use) Regulations, 1951, reg. 72 (1): "Every motor vehicle . . . and all "parts and accessories of such vehicle ". . . shall at all times be in such condition . . . that no danger is caused "or is likely to be caused to any "person . . . on a road."

Reg. 101: "If any person uses or "causes or permits to be used on any "road a motor vehicle . . . in contravention of or fails to comply with "any of the preceding Regulations ". . . he shall for each offence be "liable to a fine . . ."

The justices considered that there was no case to answer and dismissed the summons.

The prosecutor appealed.

Paul Wrightson for the prosecutor. The defendant undoubtedly was the cause of the dangerous condition of the vehicle, and was also, it is submitted, the cause of it being used on the road in a dangerous condition within the meaning of regulation 101. There is no direct authority on the meaning of the word "causes" in such a context, but Lord Wright in *Houston* v. *Buchanan*[2] considered that to cause required some mandate. A repairer who delivers back to the owner a repaired vehicle authorizes him to use it. *Houston* v. *Buchanan*[2] turned on the construction of the word "permits," which has a more restricted meaning than "causes" and involves an ability to forbid. [Reference was also made to *Goodbarne* v. *Buck*[3] and *Watkins* v. *O'Shaughnessy*.[4]]

The regulation creates an absolute offence, and it is submitted that "causes" means doing some act in the chain of events resulting in the use on the road of a motor-vehicle in a dangerous condition. The defendant had the power to prevent the offence being committed; he could have prevented the use of the vehicle in a dangerous condition by repairing it properly or by not delivering it back to the owner, but as it was he delivered it to the owner well knowing that it would be used on the road.

Guy Aldous and *D. Vowden*, for the defendant, were not called upon.

Lord Goddard C.J. stated the facts and continued: If the regulations are wide enough to make the defendant liable, I have no doubt that it might be said to be a proper thing that he should be made liable, because it was owing to the faulty work at his garage that this accident happened. But, however desirable it may be to have a regulation framed in such a way as to make him liable, we must not stretch the regulations and find a criminal offence unless one has been committed. Regulation 72 (1) provides that a vehicle "shall at all times be in such "condition . . . that no danger is caused or is likely to be caused "to any person on the vehicle or trailer or on a road." It is regulation 101 which imposes a penalty and creates the offence. [His Lordship read regulation 101 and continued:] That is an absolute prohibition; there is no question of negligence. Therefore, had the owner, who was driving the car at the time, been summoned, it is difficult to see that he would have had any defence in law, although he would have had so much in mitigation that I have no doubt that the police exercised a wise discretion in not prosecuting him. After all, he had no reason to suppose that the car brought back from the repairers was not in good condition, and although he was driving the car it was the negligence of the defendant's servant which caused the accident. The police have prosecuted the garage proprietor for causing the car to be used on a road in contravention of the regulations, and the question is whether we can say that he " caused " it to be used on the road in a dangerous condition. In one sense it might be said that he did, because it was because he delivered the car in a dangerous condition that the owner unwittingly used it on the road in that condition. But we have to consider whether it can be fairly said that within the meaning of this regulation the garage proprietor " caused " the vehicle to be on the road. The words of the regulation are " uses or causes or " permits." He obviously did not use it himself, nor did he permit it to be used, because to permit is the giving of permission, and he could not give permission to the owner to use his own car. The question is whether he caused it. When those two expressions " causes or permits " are found in contrast or juxtaposition, " permits " means giving leave and licence to somebody to use the car, and " causes " involves a person who has authority to do so ordering or directing someone to use it. If I allow a friend of mine to use my motor-car, I am permitting him to use it. If I tell my chauffeur to bring my car round and drive me to the courts, I am causing the car to be used. Although there may be civil liability, from the point of view of the criminal law I do not think that the regulation is wide enough to catch this case. Therefore, I think that the justices came to a right decision in point of law, and the appeal is dismissed.

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[2] [1940] 2 All E.R. 179, 187 (sub nom. *McLeod* (or *Houston*) v. *Buchanan*); 1940 S.C.(H.L.) 17.

[3] [1940] 1 K.B. 771; 56 T.L.R. 433; [1940] 1 All E.R. 613.

[4] [1939] 1 All E.R. 385.

HILBERY J. I am of the same opinion. On the facts stated, the garage proprietor, who had executed the repairs to the brakes of the car, redelivered it to the owner. Once he had done that he ceased to have any control or dominion over the vehicle. It was then for the owner to act according to his own will and volition in deciding whether he used it on the road or not. I cannot see how it can be said that when the owner thereafter took the car on to the road, electing to use it on the road, the garage proprietor had been any cause of his so doing. He had not directed him to do it. He had not ordered him; indeed he could not do either. He had done nothing which was an active cause of that use of the car on the road, and it is only when the car is used on the road in a condition which contravenes the regulation that the offence charged here is committed. Therefore, I think that the words used by Lord Wright in *Houston* v. *Buchanan*[1] apply, where, considering the word "cause," he said that the man in question did not cause his brother to use a van on the road: "To 'cause' the user involves some express or "positive mandate from the person 'causing' to the other "person, or some authority from the former to the latter, arising "in the circumstances of the case." Almost similar words were used and inferentially, at any rate, approved by the Court of Appeal in *Watkins* v. *O'Shaughnessy*[2] in the judgment of the county court judge in that case where he said: "There must, "in my view, be something involving control, dominance or compulsion of B's movements by A 'to cause'." I respectfully agree with those expressions and, for the reasons also given by my Lord, I think that this appeal fails.

DONOVAN J. Without condoning in any way the omission on the part of the defendant to see that the wheel was firmly secured before delivery of the car back to the customer, which omission may well involve him in civil liability, I agree that it is not possible to say as a matter of law that he caused the car to be driven on the road within the meaning of this penal regulation. "Cause" in this context involves on the authorities cited some degree of dominance or of control or some express or positive mandate, by or in the person alleged to have caused the prohibited act, and here there was no such dominance or control and no such mandate.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police; Sandford, Mervyn Taylor & Co.*

J. F. L.

[1] [1940] 2 All E.R. 179, 187.

[2] [1939] 1 All E.R. 385, 387.

C. A.

1954
Apr. 17, 18.

Somervell, Birkett and Romer L.JJ.

GOODINSON *v.* GOODINSON.

[Plaint J. 114.]

Husband and Wife—Maintenance—Agreement—Legality—Covenant by wife that so long as husband punctually made agreed weekly payments she would not commence or prosecute any matrimonial proceedings against the husband—Other considerations for agreement —Husband in arrears—Action by wife for maintenance—Covenant not illegal but unenforceable—Agreement not invalidated.
Contract—Illegality. Contra bonos mores.

A husband and wife entered into an agreement whereby the husband agreed to pay a weekly sum for the support and maintenance of the wife and the child of the marriage, and the wife covenanted, inter alia, to indemnify the husband against all debts to be incurred by her and not to pledge his credit. By clause 5 of the agreement the wife also covenanted, so long as the weekly payments were punctually made, not to commence or prosecute any matrimonial proceedings against the husband. The husband being in arrears with the weekly payments the wife instituted proceedings for maintenance:—

Held, that clause 5 on its wording must be read as a covenant only against taking matrimonial proceedings in respect of maintenance; that it was not illegal and did not invalidate the whole agreement, but was unenforceable; and that, as there was ample other consideration to support the agreement, the wife was entitled to sue for maintenance under it.

Tulip v. *Tulip* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91; *Morton* v. *Morton* [1942] 1 All E.R. 273, and *Dowell* v. *Dowell* [1952] W.N. 296; [1952] 2 All E.R. 141 applied.

Bennett v. *Bennett* [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413 distinguished.

APPEAL from Judge Wrangham, sitting at Stamford County Court.

The husband and wife having separated, on July 21, 1950, the following agreement was entered into between them: "Whereas "the husband without admitting any legal liability to maintain "the wife has agreed to pay a weekly sum of £2 for the maintenance and support of the wife and the child of the husband "and wife. Now it is hereby agreed as follows: (1) The husband "will pay to the wife for her support and maintenance the sum "of £1 a week and for the support and maintenance of the child "of the husband and wife, namely, David Goodinson . . . the sum "of £1 a week until he shall attain the age of 16 years . . . "(2) The said sum for the maintenance of the wife shall be paid "by the husband during their joint lives so long as the wife shall "lead a chaste life. (3) The wife will out of the said weekly "sums or otherwise support and maintain herself and the said "child and will indemnify the husband against all debts to be "incurred by her and against all liability whatsoever in respect "of the said child, and will not in any way at any time hereafter "pledge the husband's credit . . . (5) The wife shall not so long "as the husband shall punctually make the weekly payments "agreed to be made herein, commence or prosecute any matri- "monial proceedings against the husband, but upon the failure "of the husband to make the said payments as and when the "said payments become due, the wife shall be at full liberty "at her election to pursue all and every remedy in this regard, "either by enforcements of the provisions hereof or as if this "agreement had not been made."

The husband having fallen into arrears in the weekly payments the wife brought the present action in the county court, claiming £200 arrears of maintenance.

For the husband it was contended that by clause 5 of the agreement the wife undertook not to commence or prosecute a petition for divorce even if the husband was guilty of adultery; and that it was therefore an illegal covenant, contra bonos mores, and the whole agreement was invalidated and unenforceable.

The county court judge found for the wife. He held that clause 5 should be read as a covenant only against taking matrimonial proceedings in respect of maintenance; that the words "in this regard," coupled with other language used in the clause, indicated that the meaning of the covenant should be so restricted; and that, therefore, the covenant was not illegal. It was clearly not enforceable and the agreement must be read as if clause 5 did not exist.

The husband appealed.

T. H. Berry for the husband. The agreement is not enforceable because by clause 5 the wife undertakes not to commence or prosecute any matrimonial proceedings against the husband, which includes an undertaking not to commence or prosecute a petition for divorce on the ground of the husband's adultery. That is an illegal covenant and therefore the agreement is unenforceable from the beginning. It is contra bonos mores. The judge has read into the clause the words any matrimonial proceedings "for "maintenance." In doing so he is in error. The consideration for the husband's promise to pay the wife a weekly sum for her maintenance is her undertaking under clause 5, and if that clause is unenforceable there remains no consideration for the agreement, which, not being a bargain under seal, cannot be proceeded upon.

G. D. Lane for the wife. There is no authority to support the contention that this agreement is contrary to public policy, illegal and unenforceable. The cases draw a distinction between various types of illegality. For instance, where the agreement is to commit a crime it is unenforceable ab initio; but where the agreement is of a less heinous description the illegal part only drops out. There is nothing in any of the cases to suggest that it is contrary to public policy for a wife to agree not to take proceedings in court for increased maintenance. Even if clause 5 is not enforceable, there is sufficient consideration in the other clauses to support the agreement. The court must not look at the adequacy of the consideration provided it is real.

The cases referred to in argument are cited in the judgments.

SOMERVELL L.J. The plaintiff, who is the wife of the defendant, sued for arrears of maintenance under an agreement which was entered into between the parties on July 21, 1950. The arrears were admitted and the defendant's defence was that his wife was in desertion. That defence has not reached this court. The defence which has been submitted to us (and it is perhaps fair to the defendant to say that it was taken, we gather, quite rightly by the judge) is that the agreement is illegal and, therefore, cannot be enforced. The case was tried without evidence except for some preliminary letters which were, in my opinion, inadmissible. [His Lordship read the material clauses of the agreement, and continued:]

In *Bennett* v. *Bennett*,[1] it was pointed out that there are two kinds of illegality of differing effect. The first is where the illegality is criminal, or contra bonos mores, and in those cases, which I will not attempt to enumerate or further classify, such a provision, if an ingredient in a contract, will invalidate the whole, although there may be many other provisions in it. There is a second kind of illegality which has no such taint; the other terms in the contract stand if the illegal portion can be severed, the illegal portion being a provision which the court, on grounds of public policy, will not enforce. The simplest and most common example of the latter class of illegality is a contract for the sale of a business which contains a provision restricting the vendor from competing in or engaging in trade for a certain period or within a certain area. There are many cases in the books where, without in any way impugning the contract of sale, some provision restricting competition has been regarded as in restraint of trade and contrary to public policy. There are many cases where not only has the main contract to purchase been left standing but part of the clause restricting competition has been allowed to stand.

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[1] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.

That being the position, it is argued in the first place that this agreement is based on the construction of clause 5, which, it is submitted, on its true construction, is an agreement not to take matrimonial proceedings of any kind, whatever matrimonial offence may be committed by the husband. It is further submitted that such an agreement would be contra bonos mores and would invalidate the whole. It is unnecessary to decide what would be the result if that had been the construction of clause 5, because I agree with the judge that that is not its construction. I think that when the clause is read as a whole the undertaking not to prosecute any matrimonial proceedings so long as the sum is paid is restricted, as the judge held, to matrimonial proceedings in respect of the matters dealt with in the agreement. The judge put it in this way: "In my judgment the clause should "be read in a limited sense, as a covenant only against taking "matrimonial proceedings in respect of maintenance." He relied, quite rightly, on the words "in this regard" in the latter part of the clause. That point therefore goes.

It is next said that clause 5 is unenforceable and that the agreement is such that the unenforceability of that clause brings the whole agreement down with it, because there remains no sufficient consideration to support the covenant to pay. In *Tulip* v. *Tulip*,[2] a similar clause came before this court. The agreement there did provide, as this agreement does not, for the parties living separately. It provided for a sum to be paid for maintenance, and there was a clause as to the provision which the wife was to make out of that sum. There was no clause in the deed by which the wife undertook not to take proceedings, though, of course, even without such a clause, apart from any question of public policy and enforceability, the deed would have been a good answer if the wife had sought by legal proceedings to claim a larger sum. It would be like any other compromise of a claim.

[2] [1951] P. 378, 382; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

Birkett L.J., who delivered the first judgment, referred to the statutory provisions first of all in the Summary Jurisdiction (Married Women) Act, 1895, and then in the Married Women (Maintenance) Act, 1949, which conferred power on the High Court to order a husband "to pay any sum which it thinks "reasonable, and, if it thinks fit, also to direct that that amount "shall be secured." That provision is not to be found in section 23 of the Matrimonial Causes Act, 1950. It was held, Harman J. dissenting, that the existence of the deed did not preclude the wife from applying. Circumstances, of course, might change, and although the deed, on the face of it, was a final settlement, it was held not to be a bar to an application such as the wife sought to make in that case. I have regard to the fact that the deed in that case did not contain an undertaking not to take proceedings, but this court considered and adopted the principle of *Morton* v. *Morton*,[3] a decision of a Divisional Court consisting of Lord Merriman P. and Hodson J. That was a case where a wife had got as far as taking out a summons. The matter was compromised on heads of agreement and no deed was, in fact, drawn up; but the heads of agreement remained and were acted upon. The relevant heads of agreement will be found set out in *Tulip* v. *Tulip*[4]; they were not dissimilar to the provisions here. The wife was to have the custody of the boy with the right of access by the husband. There was also what is described as the usual clause that no proceedings should be taken while the terms of the agreement were kept. It was the effect of that clause which fell to be considered in *Morton* v. *Morton*.[5] The Divisional Court, in a decision approved by this court, held that the existence of the contract was not necessarily a bar to the making of a subsequent order.

After *Tulip* v. *Tulip*[6] had been decided *Dowell* v. *Dowell*[7] came before the Divisional Court. *Tulip* v. *Tulip*[6] was applied and, if I may say so with respect, rightly applied, to a case where the agreement contained an undertaking by the wife, as in the present case, not to sue. Not only is it not suggested in those cases that the agreement was unenforceable as against the husband, and invalid as a whole, but in *Morton* v. *Morton*,[8] the judgments in which were clearly carefully considered by this court in *Tulip* v. *Tulip*,[9] the President said[10]: "I am prepared "to hold that there is no question about the enforceability of this "contract, and that, if the question had arisen at the time, a "court could very well have compelled the execution of a deed "in that sense." What he clearly means is enforceability not quoad the undertaking not to apply but quoad the main provision and the evaluation of the sum to be paid.

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[3] 58 T.L.R. 158; [1942] 1 All E.R. 273.

[4] [1951] P. 378, 385–6.

[5] [1942] 1 All E.R. 273.

[6] [1951] P. 378.

[7] [1952] W.N. 296; [1952] 2 All E.R. 141.

[8] [1942] 1 All E.R. 273.

Of course, as regards a clause of this kind in a separation deed, it may be plain that the separation is an important ingredient which remains notwithstanding the disregard of an undertaking not to sue quoad the quantum of maintenance. But in this case it is not a separation agreement. It is sought on behalf of the husband to invoke this principle that, if the only consideration moving from one side is a covenant which the law holds to be unenforceable, then there is nothing to support the undertaking on the other side in respect of which the unenforceable covenant purported to be a consideration. Reliance is placed on the application of that principle in *Bennett* v. *Bennett*.[11] That was a special case in somewhat unusual circumstances, and so far as this part of it is concerned it turned on the actual provisions of the agreement and equally on the circumstances in which, and the time at which, the agreement was entered into. The wife in that case had instituted divorce proceedings and there was on the file a petition for maintenance. The jurisdiction of the court was being invoked. The purpose of the agreement was to settle that matter without either the sanction or approval of the court, and for that purpose, of course, it was the primary consideration on the part of the wife that she should withdraw and delete from her petition her claim for maintenance.

The special circumstances, I think, are emphasized by an observation of mine which is embodied in the headnote: "Any "application to delete, amend, or dismiss a claim for mainten- "ance on the ground that the husband has made provision for "the wife should be left to be dealt with by the judge at the "hearing of the petition, and if made to a registrar before "the hearing should be adjourned." It was in those circumstances, and having regard to the terms of the agreement in that case, that we held that the unenforceable agreement was the main, though not the sole consideration for the husband's agreement as to quantum. In the present case I think that there is ample

[9] [1951] P. 378.

[10] [1942] 1 All E.R. 273, 275.

[11] [1952] 1 K.B. 249.

consideration to support this agreement apart from the covenant not to sue, and to enable it to be enforced as against the husband in the way in which the wife seeks to enforce it in these proceedings. First of all, clause 3, under which she agreed to support and maintain herself and the child and "indemnify "the husband against all debts to be incurred by her and against "all liability whatsoever in respect of the said child and will "not in any way at any time hereafter pledge the husband's "credit" is, of course, co-extensive with the sum to be paid, subject to the time for which the agreement will subsist. Although, I think, the point was not taken below, I should have thought that the undertaking by the wife to have the custody and control of the child and bring it up until it was 16 years old, in the terms of clause 4, was also a consideration.

Then there is a matter which is more directly related to clause 5. This is an agreement by the wife as to these sums as at that date and in the circumstances then existing. If she had chosen to take proceedings, say, in the following month, it would not have been a complete shield but it would have been of great importance (as the passages to which I have referred point out) on the husband's side in asking the court to reject her application. It would have been the strongest possible evidence unless relevant circumstances had changed. For these reasons, therefore, I think that there is ample consideration to support this agreement, read as one has to read it in the light of the decision in *Tulip* v. *Tulip*.[12]

I would like to add only this. Mr. Berry, on behalf of the husband, submitted that if one looked at *Hyman* v. *Hyman*,[13] and, in particular, Lord Shaw's speech, that speech was authority for submitting that there was no difference between the principles applicable to separation and maintenance agreements and the principles applicable to divorce proceedings. He did not succeed in convincing me that there was anything in Lord Shaw's speech which led to that conclusion. That was not the issue to which their Lordships were directing their minds, and once divorce proceedings have started various considerations arise, which are pointed to in both judgments in *Bennett* v. *Bennett*,[14] which do not exist when what has happened is, as here, unfortunate differences between husband and wife leading, presumably, to a de facto separation under which, instead of running a joint household, the husband is agreeing to pay certain sums to the wife. It is obvious that if that amount can be settled by the parties with the help, perhaps, of legal advisers or others, without resort to the court, it is a very desirable thing which everybody would wish to encourage. One hopes that perhaps already, now that the decision in *Tulip* v. *Tulip* [15] has become generally known, it will be realized by both sides that such an agreement, though desirable and useful to both sides, cannot be in a form which purports to preclude the wife from applying to the court at a later date. The judge decided for the plaintiff on substantially the same grounds which I have indicated, but in view of the argument which was addressed to us, I have approached the matter de novo and stated my conclusions in my own way. I would dismiss the appeal.

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[12] [1951] P. 378.

[13] [1929] A.C. 601; 45 T.L.R. 444.

[14] [1952] 1 K.B. 249.

BIRKETT L.J. I am entirely of the same opinion. The main points in this case were most clearly presented by counsel, and the judgment to which we have just listened deals so comprehensively with all the relevant facts and the relevant law that I am content solely to express my agreement and to add nothing further for myself.

ROMER L.J. I also agree. In view of the very exhaustive way in which Somervell L.J. has considered this case there is little, indeed, that I can add. On the first point which Mr. Berry submitted, namely, that clause 5 was invalid because of the promise by the wife not to prosecute any matrimonial proceedings, it seems to me quite clear, for the reasons which my Lord has given, that those proceedings were intended to be limited to proceedings relating to maintenance. Upon that construction of clause 5 the wife was promising not to make any application for an increase in maintenance so long as the husband continued to make the agreed payments. This is not a promise which the law will recognize or enforce, as *Morton* v. *Morton*,[16] *Tulip* v. *Tulip*,[17] and *Dowell* v. *Dowell*,[18] show. In that sense, but only in that sense, the promise must be regarded as illegal.

It cannot, however, in my judgment, have in itself the effect for which Mr. Berry contended, namely, of vitiating and nullifying the whole agreement, so that the wife would be precluded from suing upon any of its other provisions. The illegality of the promise is not of the criminal or quasi-criminal character to which my Lord has referred. During the course of the discussion yesterday I suggested, as an illustration, a case where a husband and wife entered into a separation deed which provided for the maintenance of the wife and the child, and all the usual matters with which deeds of that character deal, and had in it a clause, isolated from the rest, providing that the custody of the child of the marriage should be entrusted to one of the parents and that the other parent should be precluded, at any time thereafter, from applying to the court in the matter of custody or access. Such a provision would be wholly nugatory and ineffective as seeking to oust the jurisdiction of the court in a matter in which the court has always exercised a very jealous prerogative, namely, the welfare and custody of infants. But I think that it would be quite impossible to suggest that because of the quality of that particular provision the whole of the deed would be void for illegality. The clause would be unenforceable but it would not avoid the agreement as a whole.

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[15] [1951] P. 378.

[16] [1942] 1 All E.R. 273.

[17] [1951] P. 378.

[18] [1952] 2 All E.R. 141.

In this case clause 5 cannot be enforced and must be regarded as being eliminated from the agreement, but the wife can still sue under clause 1, subject only to the question of consideration. With regard to that, it seems to me that if clause 3 were absent from the agreement so that the only consideration for the husband's promise to pay maintenance was the wife's promise not to go to the court, then clauses 1 and 2 would not be enforceable against the husband because the consideration moving from him to the wife would be wholly defeated. But clause 3 carries here an indemnity from the wife and other promises by her, all of which are presumably and, indeed, manifestly, of value to the husband; otherwise, they would not have been introduced into the agreement. Nor, in my opinion, can the wife's promise under clause 3 be regarded as being unimportant and as being merely subordinate to the main object of the agreement. On the contrary, I think that it represents one of the principal elements of the bargain between husband and wife, that bargain being that the husband must pay certain sums in maintenance, and the wife in return agreeing that those sums were to be accepted by her as being reasonable at the time, and that she would indemnify the husband against the specified liabilities.

That, I think, was the substantial contract between the parties, and one which survives without difficulty the elimination of the extra but unenforceable promise which the husband obtained from the wife under the final clause of the agreement.

In my opinion, accordingly, it is unnecessary in those circumstances to say anything about the further point upon which reliance was placed, namely, that there was forbearance by the wife, at the request of the husband, not to apply to the court for maintenance, and that that element itself would entitle her to sue upon clause 1. It is not necessary, I think, to consider that question and I personally prefer to express no conclusion upon it. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon for J. Hunt, Peterborough; Sidney C. Elphick for Kelham & Sons, Stamford.*

A. W. G.

GREENE *v.* CHELSEA BOROUGH COUNCIL.

[1952 G. No. 2091.]

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Singleton, Denning and Morris L.JJ.

Licensor and Licensee—Requisitioned premises—Occupation by family by permission of requisitioning authority — Agreement made with plaintiff's husband — Injury to plaintiff owing to negligence of authority—Status of occupants—Duty owed—Licensees—Concealed danger—Knowledge by plaintiff of danger—Failure of authority to remedy it—Plaintiff not free to act on knowledge.

Invitor and Invitee—Knowledge of invitee of danger. Emergency Legislation—Requisitioning.

By the terms of an agreement in writing made between the plaintiff's husband and the defendants (a competent requisitioning authority) the plaintiff's family, consisting of her husband (who died before the action was tried), the plaintiff herself and three children, entered into occupation of rooms in a house requisitioned by the defendants for the purpose of providing homes for people needing accommodation. An application form was sent in by the plaintiff's husband which contained the names and other particulars of the persons who were to occupy the premises, and subsequently an occupation agreement was signed by the plaintiff's husband which granted him the right to occupy the premises, specified the occupation rent to be paid, and reserved to the defendants the right to enter and inspect the premises and to carry out any repairs they thought necessary. The family went into occupation in March, 1949, and in May, 1951, the plaintiff noticed a large crack and bulge in the ceiling of the kitchen. She reported this to the defendants, who sent two men to inspect the ceiling. After testing it they left, saying words to the effect that it was all right. Nothing was done to the ceiling, and on December 1, 1951, a portion of it fell on the plaintiff's head and injured her. She brought an action against the defendants claiming damages for negligence:—

Held that, in the circumstances, the plaintiff and her family occupied the premises as licensees regardless of the person with whom the agreement was made; that the defendants owed a duty to the plaintiff to take reasonable care to prevent injury through want of repair; and that on the facts they had failed to do so and, therefore, they were liable to the plaintiff for negligence.

Southgate Borough Council v. *Watson* [1944] K.B. 541; 60 T.L.R. 392; [1944] 1 All E.R. 603 applied.

Cavalier v. *Pope* [1906] A.C. 428; 22 T.L.R. 648 distinguished.

Per Denning L.J. The knowledge by the plaintiff of the crack and bulge as constituting a danger would not, under the principle laid down in *London Graving Dock Co.* v. *Horton* [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1, disentitle her from recovering, since knowledge by the person claiming damages was only a defence when that person was free to act on the knowledge to avoid the danger, which the plaintiff in the present case was unable to do, since she was compelled to remain on and use the premises.

Decision of Cassels J. affirmed.

APPEAL from Cassels J.

The plaintiff, Mary Greene, claimed damages from the defendants, the Chelsea Borough Council, who were the requisitioning authority for the borough of Chelsea, for personal injuries sustained by her owing to the alleged negligence of the defendants, as the result of which she alleged that the ceiling of premises at 28, Elm Park Gardens, a requisitioned house in which the plaintiff and her husband and family were permitted to occupy certain rooms by the defendants, fell and injured her. The plaintiff's husband, Joseph Greene, with whom the occupation agreement was made, was originally a co-plaintiff in the action but died before it came on for trial, and the action was treated as being that of the plaintiff alone. The defendants denied negligence, and at the trial contended that they owed no duty to the plaintiff. Cassels J. gave judgment for the plaintiff for £250 general damages and £21 special damages. The defendants appealed.

The facts are fully stated in the judgment of Singleton L.J.

Marven Everett Q.C. and *Sir Shirley Worthington-Evans* for the defendants. Cassels J. was wrong in holding that the defendants, as the requisitioning authority, owed a duty to the plaintiff. He purported to base his decision on *Hawkins* v. *Coulsdon and*

Purley Urban District Council,[1] but it is submitted that the present case is not covered by that authority but by the principle established by *Cavalier* v. *Pope*[2] and followed in other cases. It was held in *Cavalier* v. *Pope*[2] that in the case of a tenancy agreement made by the owner of a dilapidated house under which he contracted with the tenant to do the repairs, the wife of the tenant not being a party to the agreement, and, therefore, a stranger to the contract, could not succeed in a claim for injury sustained by her, owing to the landlord's failure to repair the premises. For that doctrine to apply it is not necessary that the relationship of landlord and tenant, which it is conceded cannot be created by a requisitioning authority, should exist between the owner of the premises and the plaintiff's husband; it is sufficient if the relationship is of a contractual character. If there is a contract, it must govern the position so far as the premises are concerned, and the rights and duties of the parties are regulated by the contract.

[SINGLETON L.J. The real question for decision is whether, when there is a requisition of property for homeless people, it is right to say that the requisitioning authority owes no duty to anyone except the person with whom an agreement for occupation has been signed—in the present case the plaintiff's husband.]

It is so submitted. In any event the plaintiff at the most could only have been in the position of a licensee, and under the decision of the House of Lords in *London Graving Dock Co.* v. *Horton*[3] there was no breach by the defendants of their duty to the plaintiff as such, because the danger in the present case was not a concealed danger or a trap, but one of the existence of which the plaintiff was fully aware. That being so, her claim against the defendants must fail. [Reference was also made to *Minister of Agriculture and Fisheries* v. *Matthews*[4] and *Donoghue* v. *Stevenson*.[5]]

T. G. Field-Fisher for the plaintiff. The decision of Cassels J. was right. The housing accommodation in the present case was provided for the Greene family as a whole. The council retained the control of the whole of the premises and did not divest themselves of their obligations in regard to any part of them. Even if a contract exists, there may easily be obligations other than those which actually arise under it. It would be a mistake to say that the plaintiff's husband was the only licensee of the premises; it was necessary, however, to have some person to whom the council could look. As to the duty to the plaintiff as a licensee, Cassels J. was right in holding that the ceiling constituted a danger which was not appreciated by her. If she did suspect any danger, it is clear that her mind was set at rest after the visit of the council employees, and the ceiling thereafter became a trap, the danger of which she did not appreciate, and, that being so, she was entitled to recover. [*Porter* v. *Jones*[6] was referred to.]

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[1] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

[2] [1906] A.C. 428; 22 T.L.R. 648.

[3] [1951] A.C. 737; [1951] 1 T.L.R. 1949; [1951] 1 All E.R. 1.

[4] [1950] 1 K.B. 148; 65 T.L.R. 655; [1949] 2 All E.R. 724.

[5] [1932] A.C. 562; 48 T.L.R. 494.

Marven Everett Q.C. replied.

SINGLETON L.J. This is an appeal from a judgment of Cassels J. given on January 28, 1954. He had before him the claim of Mrs. Mary Greene for damages for personal injuries which she alleged were caused through the negligence of the defendants. She was the wife of one Joseph Greene, who was a plaintiff with her in the action, but who died before it came on for trial. The action was treated as her action alone.

The defendants are the requisitioning authority for the borough of Chelsea, and, like many other local authorities, they exercised their powers of requisitioning property so that they could provide accommodation for people who otherwise would not have had it. The plaintiff and her husband had applied to the defendants for housing accommodation in 1947, and in the form which was signed by the plaintiff's husband, particulars of his family were given. There was a further set of particulars given later. On March 7, 1949, the property manager for the defendants wrote a letter addressed to Greene: "Dear Sir/Madam, "With reference to your application for housing accommodation, "the council can now offer you:—3rd and 4th floors, 28, Elm "Park Gardens. Will you please call here betweeen 9.30 a.m. "and 4.30 p.m. (excepting Saturday) for the key to view and "bring this letter with you. I should be glad to hear from you "immediately whether you wish to accept this offer which can, "in any case, only remain open for three days from this date." Thereafter an assessment form was filled up and supplied to the defendants. It is dated March 9, 1949, and gives the address and the position in the house of the rooms, the third and fourth floors; name of the householder, and the names and ages of those for whom the accommodation is required: Joseph Greene, Mary

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[6] [1942] 2 All E.R. 570.

Greene, the plaintiff, Christopher, who was then 15 years old and an apprentice bootmaker earning £1 7s. a week, or 18s. net income, a girl of 13, and John, a boy of eight. The total income of the family is shown to be £5 18s., and at the foot of the form there appear these words: "I declare that the foregoing "particulars of my family circumstances are true and that any "change will be notified at once to the housing manager. Signed "on behalf of J. Greene, Mary Greene (Wife)."

At odd times thereafter there was correspondence between the property manager and the plaintiff. Mrs. Greene said that she wanted ground-floor accommodation because of heart trouble, and the property manager wrote to her on one or two occasions. I do not think that there is great importance in the fact that correspondence took place with her.

Following upon the assessment form which was completed on March 9, 1949, the plaintiff, her husband and the family of three children were allowed into that part of 28, Elm Park Gardens, which constitutes the third and fourth floors. That was thought by the defendants to be suitable accommodation for the family consisting of the persons named, and the amount which was to be paid for the accommodation was, according to the practice of the defendants, one-fifth of the total family income: namely, 26s. 3d. a week.

At or about the time the family went into this part of the house, an agreement was drawn up and was signed by the plaintiff's husband. It is headed: "Metropolitan Borough of Chelsea. "An agreement made the 6th day of April, 1949, between the "council of the Metropolitan Borough of Chelsea (hereinafter "called 'the council') acting by John Clark Kitchin the town "clerk of the one part and Joseph Greene, greengrocers' handy-"man (hereinafter called 'the occupier') of the other part," and there is a recital: "Whereas the use of the premises known as "28, Elm Park Gardens, for certain emergency purposes is, as "the result of action taken under regulation 51 of the Defence "(General) Regulations, 1939, under the control and manage-"ment of the council." It was agreed that: "1. In consideration "of the payments by the occupier hereinafter mentioned and of "the conditions hereinafter contained, on the part of the occupier "to be observed the council hereby gives its licence and authority "for the occupier to occupy the front middle and back rooms "and w.c. on the third floor, front and middle rooms on the "fourth floor and to use the second floor bathroom and basement

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"back room from the 21st day of March, 1949, until such "occupation is determined in manner hereinafter provided."

The agreement contained two other clauses which I ought to mention. Clause 4: "The occupier will permit the council or its "officers or agents at all reasonable times of the day to enter into "and upon the said premises and to examine the state and "condition thereof and to effect any repairs which the council "may consider necessary." Clause 7: "Nothing in this agreement contained shall authorize the occupier to continue in "occupation of the premises after the use of the premises has "ceased to be under the control and management of the council "under emergency powers." Thus, the case is one in which the local authority requisitioned a house and allotted the use of part of that house to the plaintiff's husband, as it is said by the defendants, or to him and the members of his family, as it is said on behalf of the plaintiff.

On some date in May, 1951, the plaintiff noticed that there was a crack in the ceiling of the back room on the third floor, which was her kitchen. She reported that to the rent collector when he called for what is spoken of as the rent. She said that about a week after she reported it two men from the council came in and inspected the ceiling. They took the handle of a brush and went round tapping the ceiling to test it, and as they were leaving they said: "All right," as though speaking to themselves. The plaintiff was asked: "They said what? (A.) It was "all right. Whether they meant the ceiling or not I do not know, "but they just said that it was all right as they were going "out."

Nothing further was done by the defendants about the ceiling. The plaintiff had described it as having a large crack in it, and that it was bulging. Obviously, it was something which she thought she ought to point out, in view of the fact that the defendants had retained the right to do, and the duty of doing, repairs on the premises. On December 3, 1951, the plaintiff was in her kitchen getting tea, when, as she said, more than a quarter of the ceiling came down without any warning. She was hurt, and she brought this action against the defendants. She alleged that there was negligence on their part. Cassels J. decided that she was entitled to succeed, and assessed the damages which she should recover at the sum of £271, being £21 agreed out-of-pocket expenses and £250 general damages, and he gave judgment in her favour for that amount. The defendants appeal against that judgment, and we have had an interesting argument on a matter of which it can be said that there is no authority directly covering the position.

The submission made on behalf of the defendants is that, in the circumstances of this case, there was no liability upon them to the plaintiff, because the case ought to be regarded in the same way as it would have been if there had been a tenancy agreement between the defendants and the plaintiff's husband, in which case the plaintiff, who was no party to the contract, could not recover. For that submission Mr. Marven Everett relied upon *Cavalier* v. *Pope*.[1] In that case the owner of a dilapidated house contracted with his tenant to repair it, but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair. It was held that the wife, being a stranger to the contract, had no claim for damages against the owner. Lord Loreburn in the course of his speech put the case in a few words, holding that the judgment of the Court of Appeal ought to be affirmed; he said[2]: "I can find no right of action in the wife of the tenant "against the landlord either for letting the premises in a "dangerous state or for failing to repair them according "to his promise. The husband has sued successfully for "breach of contract, but the wife was not party to any contract. "Accordingly the appeal fails."

Mr. Everett submitted that that decision of the House of Lords ought to be treated by this court as binding in the circumstances of the present case, and that we ought to allow the appeal from the judgment of Cassels J. He submitted that it did not matter whether the position of landlord and tenant, properly so called, existed so long as there was a contract between the plaintiff's husband and the defendants; that the respective rights of the defendants and the plaintiff's husband were to be determined by that contract, and that the plaintiff could have no rights of any kind. His submission was that no duty was owed by the defendants to the plaintiff or to any member of the family inside the premises, the use of which was given or allotted to her husband. On the other hand, Mr. Field-Fisher, for the plaintiff, submitted that whether one looked at the documents or considered the purpose of the requisition, the case constituted an allowing by the defendants of the use of the premises by the husband, wife and children named on the application and on the assessment form, and it was said that the decision in

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[1] [1906] A.C. 428; 22 T.L.R. 648.

[2] [1906] A.C. 428, 429.

Cavalier v. *Pope*[3] did not govern a case of this kind; that the court ought to look at all the circumstances and to say that there was a duty owing to the plaintiff and to the other members of the family, and that there was a breach of that duty leading to the injury which the plaintiff sustained.

It is desirable to consider the duties of a requisitioning authority and the position which arises in circumstances such as the present. In *Southgate Borough Council* v. *Watson*[4] the decision of the court was that: " A competent authority who has " requisitioned a house under regulation 51 of the Defence " (General) Regulations, 1939, under powers delegated by the " Minister of Health, has no power to create a tenancy with " regard to that house, and the person who has been let into " possession of the requisitioned house because he has been " rendered homeless by enemy action and has been required to " pay rent for that accommodation is not thereby made a tenant " thereof so as to enable him to claim the protection of the Rent " Restrictions Acts."

Scott L.J., in a short judgment said[5]: " The question in this " case is whether the competent authority who requisitioned the " house had power under the Defence Regulations to create a " tenancy, turning himself into a landlord and turning into a " tenant the person who was put into possession of the house " because he had lost possession of his own house by enemy action. " The county court judge gave a simple, short and entirely sound " judgment in which he held that no tenancy had been created. " I think that right. The defence put forward by the defendant " to the claim for possession of the house is that, the house being " within the Rent and Mortgage Interest (Restrictions) Act, " 1939, he, as a person accommodated by the competent " authority in these requisitioned premises and paying rent there" for, thereby became a tenant of the premises within the " meaning of the Rent Restrictions Acts, so that he acquired the " right to remain in the house. It would have been a great " injustice to the owner of the premises if effect had to be given " to that contention, but that is neither here nor there. It is " clear that no tenancy was created by the action of the com" petent authority, and that that defence, the only defence put " forward, entirely fails. The appeal must, therefore, be dis" missed." That view has been followed ever since.

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[3] [1906] A.C. 428.

[4] [1944] K.B. 541; 60 T.L.R. 392; [1944] 1 All E.R. 603.

[5] [1944] K.B. 541, 544.

In *Errington* v. *Errington*,[6] Denning L.J. in the course of his judgment referred to a number of decisions, and in particular to the words of Lord Greene M.R. in *Booker* v. *Palmer*,[7] where the Master of the Rolls said[8]: "To suggest there is an intention "there to create a relationship of landlord and tenant appears "to me to be quite impossible. There is one golden rule which "is of very general application, namely, that the law does not "impute intention to enter into legal relationships where the "circumstances and the conduct of the parties negative any "intention of the kind." Denning L.J.'s comment on that dictum was: "Those emphatic words have had their effect. We "have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees"; and the Lord Justice then referred to *Minister of Health* v. *Bellotti*,[9] *Southgate Borough Council* v. *Watson*,[10] and *Minister of Agriculture and Fisheries* v. *Matthews*.[11]

When premises are requisitioned by a competent authority, and the competent authority allows people who are homeless to go into those premises, no tenancy is created. The requisitioning authority is in possession, and allows the person, or persons, the use of those premises, or the part of the premises so allotted. The purpose of the requisition is to find homes for people who otherwise would have nowhere to go. The purpose is not to let a house to a homeless person, but to provide accommodation for him; that is, to allow the use of it to the person or persons.

It was submitted by Mr. Everett that in those circumstances there is no duty owed by the requisitioning authority to anyone except the person who signs the agreement. During the course of the argument I wondered what the position would be in a case of, say, ten evacuees, all of different families for whom a place was found in this way. In such a case someone has to be responsible for the amount due week by week or month by month, and someone, no doubt, enters into an agreement of some kind; is it right to say that in such a case there is no duty owed to anyone except to the one who signs the agreement? I cannot think it is. Surely there must be a duty to act reasonably in regard to all those for whom accommodation is found, or, at least, to take reasonable care of the premises which persons are allowed by the requisitioning authority to use. What is reasonable care depends upon all the circumstances. If a requisitioning authority, doing the best it can, takes over a house in bad repair when accommodation has to be found urgently, it may be it cannot do, or be expected to do, very much; those who enter into the house know its condition, and it may be that the measure of duty on the authority is not very high.

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[6] [1952] 1 K.B. 290, 297; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

[7] [1942] 2 All E.R. 674.

[8] Ibid. 677.

[9] [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238.

[10] [1944] K.B. 541; 60 T.L.R. 392; [1944] 1 All E.R. 603.

[11] [1950] 1 K.B. 148; 65 T.L.R. 655; [1949] 2 All E.R. 724.

In the present case, can it be said, first, that there was no duty owed to the plaintiff; and, secondly, that if there was such a duty owed, there was no evidence on which the judgment of Cassels J. that the defendants failed in their duty can be supported? It seems to me on the first point that when the defendants are told that the premises are required for the use of five people who are named on the application form, and those five people go to the premises and live there, that each one of them is really in the same position as a licensee, and that the court ought not to look upon the one who signs the agreement as the licensee to the exclusion of the others. The purpose of the requisitioning of the premises was for the use of the persons named in the application. I am dealing with this particular case and with no other, and it appears to me that a duty of care was owed by the requisitioning authority to each one of the persons so named and accommodated. Did the defendants fail in the duty which they owed? The duty varies according to the circumstances. Denning L.J. said in *Hawkins* v. *Coulsdon and Purley Urban District Council* [12]: "What is reasonable care in "regard to him depends on all the circumstances of the case. "The relevant considerations include all those facts which could "affect the conduct of a reasonable man and his decision on "the precautions to be taken: *per* Lord Normand in *Paris* v. "*Stepney Borough Council*" [13]; and in 1923 in *Mersey Docks and Harbour Board* v. *Proctor*,[14] a case dealing with the duty owed to a licensee, Lord Sumner stated the position of a licensee, and said [15]: "As usual in cases of duties of care, the reasonable "man is the standard on both sides."

The plaintiff saw a crack in the ceiling and a bulge; she pointed that out to the rent collector, and the result was that two men from the defendants were sent to inspect; they did the inspection which they thought was necessary, and I assume that the defendants would send round competent people to inspect; they said something to the effect that it was all right. Nothing was done.

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[12] [1954] 1 Q.B. 319, 337; [1954] 1 All E.R. 97.

[13] [1951] A.C. 367, 381; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[14] [1923] A.C. 253; 39 T.L.R. 275.

[15] [1923] A.C. 253, 274.

After this accident to the plaintiff a further inspection was made by someone on behalf of the defendants who gave evidence and said: "We can generally guess what caused it to fall—the "key breaking. Before we test we know that it is the key that "has gone and that is the cause of the fall. (Q.) But was there "anything to indicate to you what had broken the key? (A.) No. "(Q.) Was there any sign of excessive water? (A.) No; it was "quite dry there. (Q.) This may appear to you to be a silly "question, but is there anything which helped you to see whether "there had been a crack in the plaster before it fell? (A.) Well, "I can enlighten you on this. It was a new patch of plaster-"work—that is, what we call new; about 12 years old." He added: "Any ceiling is liable to fall although it looks good. "There need not be any cracks in the ceiling, but the key can be "gone and it will fall down in bulk. You would not know until "you tested. That is why we make tests." The plaintiff had no expert knowledge on this subject; the defendants sent people who made some sort of tests; they sent them because of her complaint. Either the test they made cannot have been sufficient, or the defendants unduly delayed to do the repairs which were necessary.

When the witness was cross-examined he was asked: "You "have told my Lord that the ceiling with a crack or two in it "may or may not be dangerous according to whether the key has "been affected? (A.) Yes, that is right. (Q.) Suppose it has a "few cracks in it—quite large cracks—and in addition to that it "is bulging? (A.) If it is bulging you do not need to test; you "know that has got to come down naturally. (Q.) If it has "got a bulge, that would indicate to you as an experienced man "that the key has gone? (A.) Yes, definitely."

Those whom the defendants sent to inspect ought to have discovered that the ceiling was dangerous. There is nothing to show that the plaintiff knew that it was dangerous. She was entitled to rely on what was said by the defendants' men. There was a crack in her ceiling; she thought it her duty to point it out to those who were responsible for repairs. Six months later the ceiling collapsed and she was hurt. In those circumstances, it appears to me that Cassels J. was entitled to hold, as he must be taken to have done, that there was in the ceiling a danger of a kind which was not appreciated by the plaintiff (though she knew of the crack), and that the defendants had not done that which they ought to have done after she pointed out the crack. They could have said: "You must not remain under that crack; it is "dangerous." They did not do that. They could have put someone on to repair the crack where this old patch was, and the accident would not have happened. In the circumstances it seems to me that the defendants owed a duty to the plaintiff, that they failed to perform that duty; in other words, that there was negligence on their part, and that she is entitled to hold the judgment in her favour given by Cassels J.

I do not think it is necessary to go into other points which have been raised. The decision in this case is one given on the facts of this case, and I have been anxious not to say anything which might lead to the thought that there is a wider duty upon the requisitioning authority than that which I have stated. In my judgment, the appeal should be dismissed.

DENNING L.J. During the nineteenth century there was a doctrine current in the law which I will call the "privity-of-"contract" doctrine. In those days it was thought that if the defendant became connected with the matter because of a contract he had made, then his obligations were to be measured by the contract and nothing else. He owed, it was said, no duty of care to anyone who was not a party to the contract. This doctrine received its quietus by the decision of the House of Lords in *Donoghue* v. *Stevenson*,[16] but it has been asserted again before us today. We must, I think, firmly resist the revival of this out-worn fallacy. *Cavalier* v. *Pope*[17] is a relic of it which must be kept in a close confinement. This is not a landlord and tenant case. It is a requisitioning case. The duty of the defendants here arose not out of contract, but because they, as the requisitioning authority, were in law in possession of the house, and were in practice responsible for the repairs. This practical responsibility meant that they had control of the house for the purpose of repairs; and this control imposed upon them a duty to every person lawfully on the premises to take reasonable care to prevent damage through want of repair. What is reasonable care depends on all the circumstances of the case. This is borne out by the decision of this court in *Hawkins* v. *Coulsdon and Purley Urban District Council*.[18]

[16] [1932] A.C. 562; 48 T.L.R. 494.

[17] [1906] A.C. 428.

[18] [1954] 2 W.L.R. 122, 134.

There is no doubt in the present case that the council did not use reasonable care. They were warned of the defect and did not remedy it within a reasonable time; but it was said that they were not liable because the plaintiff knew of the defect, or, at all events, had notice of it. She knew that the ceiling was cracked and had a bulge in it. Indeed, she herself, or her husband, had drawn the attention of the rent collector to it. It was said that that knowledge disentitled her to recover on the authority of *London Graving Dock Co.* v. *Horton.*[19] I recognize that that case is applicable to licensees as well as to invitees: but I think it has been misunderstood. In my judgment, knowledge or notice of the danger is only a defence when the plaintiff is free to act upon that knowledge or notice so as to avoid the danger. Lord Porter in *Horton's* case [20] made it clear that the plaintiff, to be disentitled, must not only know of the danger but must "accept the risk" of it, or, as he put it,[21] the man must "undertake the risk" of performing his task with full appreciation of the danger. A man can hardly be said to accept the risk, or to undertake the risk, when he is not free to avoid it.

The point in *Horton's* case [22] which I think has been overlooked, was that Horton probably had a remedy under his contract of service. Both Lord Porter and Lord Normand appear to have thought that Horton would have had a greater prospect of success if he had sued his employers instead of the occupier. A complaint had been made to his employers' foreman about the condition of the staging as well as to the occupier's chargehand.[23] There was ground for thinking that the employers were negligent in requiring the men to go on using the staging in its dangerous condition, and were responsible to the plaintiff accordingly.

Once this is realized, then the reason why Horton failed to recover becomes clear. He ought to have sued his employers and not the occupiers. The majority of their Lordships thought that if Horton chose to sue the occupiers instead of his employers, he must be regarded, in proceedings against the occupiers, as free to avoid the danger, and he was disentitled, therefore, to sue them. This is shown by what Lord Normand said [24]: "The sufferer "must make up his mind whether to sue as an invitee or as an "employee under his contract of service. He cannot, in my

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[19] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[20] [1951] A.C. 737, 746.

[21] Ibid. 747.

[22] [1951] A.C. 756.

[23] [1950] 1 K.B. 426.

[24] [1951] A.C. 756.

"opinion, sue as an invitee and at the same time found upon "his contract of service as restricting his *freedom to act* upon "a warning of unusual danger given to him by the invitor." I underline the words "freedom to act." They give the key to the decision. The plaintiff is only disentitled when she is free to act on the warning. In cases where there is no contract of service, the question whether the plaintiff was free to avoid the danger depends on the circumstances of the case. Lord Macdermott in his speech [25] gave an illustration of a case where the plaintiff was not so free, the justice of which is, I think, beyond doubt.

If knowledge or notice is only a bar in so far as the party is free to act upon it, I ask myself in the present case: was the plaintiff in a position to act upon her knowledge of the defective ceiling so as to avoid the danger of it? She and her husband were housed by the requisitioning authority because they were homeless, or, at all events, had not enough room in which to live. They had nowhere to go, and the accommodation provided by the requisitioning authority was limited to their bare needs. Can anyone reasonably say that she was free to give up the use of the kitchen in this house simply because the ceiling had a crack in it and was bulged? In my judgment, she was not free to avoid the danger. She had to stay there and live in her kitchen. Although she had notice of the danger, it does not disentitle her from recovering for the negligence of the local authority. An interesting parallel can be seen in *Porter* v. *Jones*,[26] to which we were referred by Mr. Field-Fisher. I agree, therefore, that this appeal should be dismissed.

Morris L.J. I have reached the same conclusion. The defendants were not in a position to grant a tenancy, and it is clear that they did not grant one. The situation was that there was a family which was in need of accommodation. There were, doubtless, other families in similar need. The defendants considered the position of this family, which consisted not only of Mr. and Mrs. Greene but of the children as well. The defendants considered also the accommodation which they then possessed and the means of the family, and, deciding upon the information that was before them, they came to the conclusion that they should give accommodation in premises which they had requisitioned. It was possible for the family to make payment, and the amount of

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[25] [1951] A.C. 756, 758.

[26] [1942] 2 All E.R. 570.

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Morris L.J.

the payment was calculated with reference to the particular facts and the situation of the members of the family. It was then necessary to make some agreement for the appropriate amount to be paid, and an agreement was made with the plaintiff's husband. In the agreement the words used were that the defendants gave their licence and authority to occupy. In that situation the position, as it seems to me, was that the defendants were giving licence to the members of the family to enter upon the rooms specified, and that the members of the family became licensees of the defendants. In the early part of 1951 the plaintiff noticed a state of affairs in regard to the ceiling in her kitchen, and she gave notice of that state of affairs. It was not for her to have the requisite knowledge to determine whether that state of affairs constituted a danger or not. Notice having been given, representatives were sent by the defendants to examine the ceiling, and having looked at it and made some observation about it, and having then left and gone away, it was reasonable for the plaintiff thereafter to be of the opinion that she would be told if there was a state of danger. The defendants' representatives so sent to see what was there to be seen, and to decide in regard to it, had the material before them which enabled them to say that it was in fact dangerous, and they had every opportunity to examine, to test, and to observe, and all the facts were within their knowledge. It seems to me, therefore, that there was ample material to support the view that the defendants, through their agents, knew of a danger, and that they were under a duty to warn their licensees of that danger, and that they failed to perform that duty. I, therefore, think that this appeal fails.

Appeal dismissed.

Solicitors: *William Charles Crocker; Pennington & Son.*

P. B. D.

1954
May 12.

Lord Goddard C.J., Hilbery and Donovan JJ.

REGINA *v.* SALISBURY AND AMESBURY JUSTICES. *Ex parte* GREATBATCH.

Justices—Election to go for trial—Summary offence—Duty of justices to inform accused of right to trial by jury—Election by advocate—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 25 (3).

On a charge of a summary offence for which the person charged may claim to be tried by a jury, a court of summary jurisdiction must first tell the accused of his right, instead of being tried summarily, to be tried by a jury and then must ask him whether he wishes to be so tried.

There is nothing to prevent a solicitor or counsel from making the election providing that it is done in the presence of the accused.

The applicant was charged with the offence of dangerous driving. At the hearing before the justices he was asked whether he wished to be tried summarily. His solicitor replied that he accepted the jurisdiction of the court and pleaded Not Guilty on his client's behalf. The applicant was convicted:—

Held, that there was no objection to the solicitor making an election on behalf of his client, but, as the court had not informed the applicant of his right to be tried by a jury and asked him whether he wished to be so tried, they had no jurisdiction to deal with the case and the conviction should be quashed.

Reg. v. *Cockshott* [1898] 1 Q.B. 582; 14 T.L.R. 264 applied.

Dictum of Charles J. in *Rex* v. *Quinn, ex parte Halstead* (1943) 107 J.P.N. 459 disapproved.

Motion for certiorari.

The applicant, Sidney Colwell Greatbatch, was charged before the Wiltshire justices with dangerous driving contrary to section 11 of the Road Traffic Act, 1930. The applicant was present at the hearing, where he was represented by a solicitor. According to the affidavits of the chairman of the justices and their clerk, the applicant answered to his name and the clerk then read out the charge. The chairman then, as was his usual practice, asked the applicant whether he wished to be tried summarily. The applicant's solicitor rose to his feet, said that he was representing the applicant, that he accepted the jurisdiction of the court and pleaded Not Guilty on the applicant's behalf. The case then proceeded. The applicant was convicted and fined £10 and ordered to pay costs of £3 2s. 4d.

The applicant applied for an order of certiorari to quash the conviction and sentence on the ground of want of jurisdiction in virtue of the disregard by the justices of the form and procedure established by section 25 of the Magistrates' Courts Act, 1952.[1]

R. C. H. Briggs for the applicant. There are two grounds on which certiorari is sought: first, that the justices did not give the applicant an opportunity of electing to be tried by jury; and, secondly, that the consent to be tried summarily was indicated by the applicant's solicitor, and not, as it should have been, by the applicant personally. As to the first ground, on the justices' own affidavits it is clear that the procedure as laid down in section 25 of the Magistrates' Courts Act, 1952, was not complied with.

[LORD GODDARD C.J. There is abundant authority for saying that if the justices do not give an accused the opportunity, in a proper case, of being tried by a jury, the conviction is bad.]

It was the duty of the justices, first, to inform the applicant of his right to be tried by a jury, and secondly, to ask him if he wished to be so tried. In *Reg.* v. *Kent Justices, ex parte Machin*,[2] where the accused was not told that if he was convicted by the justices he might be committed to quarter sessions for sentence, this court, applying *Reg.* v. *Cockshott*,[3] quashed the conviction, pointing out that the statutes dealing with the procedure in those matters were peremptory and must be strictly complied with. [*Stefani* v. *John*[4] was also referred to.]

As to the second ground, the note to Stone's Justices' Manual,

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[1] Magistrates' Courts Act, 1952, s. 25: "(1) Where a person who "has attained the age of fourteen is "charged before a magistrates' court "with a summary offence for which "he is liable . . . to be sentenced "by the court to imprisonment for a "term exceeding three months, he "may, subject to the provisions of "this section, claim to be tried by a "jury, unless the offence is an "assault or an offence under section "one of the Vagrancy Act, 1898. "(2) Where under the preceding sub-"section or any other enactment a "person charged with a summary "offence is entitled to claim to be "tried by a jury, his claim shall be "of no effect unless he appears in "person and makes it before he "pleads to the charge; and, where "under any enactment the prosecu-"tor is entitled to claim that the "accused shall be tried by a jury, his "claim shall be of no effect unless he "makes it before the accused pleads "to the charge. (3) A magistrates' "court before which a person is "charged with a summary offence for "which he may claim to be tried "by a jury shall, before asking him "whether he pleads guilty, inform "him of his right and, if the court "thinks it desirable for the informa-"tion of the accused, tell him before "what court he would be tried if tried "by a jury and explain what is meant "by being tried summarily; and shall "then ask him whether he wishes, "instead of being tried summarily, "to be tried by a jury."

[2] [1952] 2 Q.B. 355; [1952] 1 T.L.R. 1197; [1952] 1 All E.R. 1123.

[3] [1898] 1 Q.B. 582; 14 T.L.R. 264.

[4] [1948] 1 K.B. 158; 63 T.L.R. 612; [1947] 2 All E.R. 615.

85th ed., p. 61, states that the right to elect to be tried by jury should be addressed to the defendant personally and that he should reply. In support of this proposition *Rex* v. *Quinn, ex parte Halstead*[5] is cited.

Gilbert Rountree for the respondents. In the absence of evidence to show that the formalities were not properly observed, the maxim "omnia praesumuntur rite esse acta" should apply. The chairman in his affidavit said that "he followed the usual "practice." Section 25 (3) does not specify any exact words to be used. If the words used either on the face of them or by implication indicate the right to trial by jury then the section has been complied with. *Cockshott's* case[6] was decided on section 17 of the Summary Jurisdiction Act, 1879, in which a form of words is set out. No precise formula need now be used under section 25 of the Act of 1952. It is sufficient if words are used which indicate to the accused what his right is. The section does not limit the way in which he may answer.

[Lord Goddard C.J. He need not answer at all, in which case he can be tried summarily.]

If he stands silent while his solicitor answers for him it is assumed that the solicitor is acting on authority. Certiorari is discretionary.

[Lord Goddard C.J. Not if it goes to jurisdiction.]

In *James* v. *Bowkett*[7] the defendant, having been informed of his right, elected to be tried summarily, but the prosecutor failed formally to apply under section 28 (1) of the Criminal Justice Act, 1948, for the case to be tried summarily and opened his case and called his evidence. It was held that his failure did not go to jurisdiction. In *Rex* v. *Ashbourne Justices, ex parte Naden*[8] it was held that in the case of a mere irregularity the court had a discretion in the granting of the order and would inquire whether any injustice had been done. In the present case no injustice has been done and certiorari ought not to issue.

Lord Goddard C.J. Mr. Briggs moves for an order of certiorari to bring up and quash the conviction of Sidney Colwell Greatbatch, who was convicted before the Wiltshire justices sitting in the petty sessional division of Salisbury and Amesbury last November on a charge of dangerous driving and fined £10. Leave was granted on the ground that there was "want of jurisdiction

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[5] (1943) 107 J.P.N. 459.

[6] [1898] 1 Q.B. 582.

[7] [1952] W.N. 341; [1952] 2 T.L.R. 100; [1952] 2 All E.R. 320.

[8] [1950] W.N. 51.

" in virtue of the disregard by the said justices of the form of " procedure established by section 25 of the Magistrates' Courts " Act, 1952." That is a rather wide statement and enables the applicant to take any advantage that is open to him under section 25 of the Act of 1952, and I think that the court ought perhaps to be more careful when these matters are moved to see that the grounds are set out with more precision.

The point which arises is a very short one. The offence of dangerous driving can be dealt with either summarily or on indictment. It can be dealt with on indictment because a separate penalty is provided, and therefore justices can always send the case for trial if they think that it warrants it. We decided that in this court in *Rex* v. *Justices of Oxford County Quarter Sessions, ex parte the Director of Public Prosecutions.*[1] Then, as the defendant is liable on conviction to more than three months' imprisonment on summary conviction, he has a right to object to being tried summarily and to claim trial by a jury. As it is one of those cases which in the old days was always referred to as a section 17 case, that is to say, section 17 of the Summary Jurisdiction Act, 1879, certain formalities have to be observed before the accused person is called upon to plead, and the law is now contained in section 25 of the Magistrates' Courts Act, 1952, which is a consolidating Act. It does not amend the law, but very often puts sections in different language.

[His Lordship read section 25 and continued:] So far as the accused is concerned, the charge is prima facie a summary charge, but if he appears, and only if he appears, he has the right to claim trial by a jury: subsection (3) is, I think, the material subsection in the present case. Nothing can be clearer than the words in that subsection. They are lifted almost directly from the old section 17, although section 17 laid down a formula and put in inverted commas the exact question which the magistrate was to ask. But it is exactly reproduced here, and the important words are " inform him of his right," and they are to ask him whether he wishes to be tried by a jury instead of being tried summarily. I am not going to blame the justices, for no injustice was done as the applicant was in court, represented by a competent solicitor, and the magistrate said to him: " Do you wish " to be tried summarily? ", and his solicitor said for him that he did.

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[1] Unreported decision of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Humphreys and Atkinson JJ.), dated December 12, 1947.

Ever since *Reg.* v. *Cockshott* [2] this court has always insisted on the provisions of section 17, now section 25, being strictly complied with, for this reason, among others, that according to the decision of Wright J. in that case—and a few other higher authorities on matters relating to statutory law—justices who did not put that question had no jurisdiction to try the case at all. Of course, nearly every accused person who is given the chance of being tried summarily takes it, unless he is charged with being under the influence of drink, when he always goes to quarter sessions if he can and, for some reason, nearly always gets acquitted, but that is the fault of juries and not of the law. In certain cases the justices may not give the accused the chance of being tried summarily, but simply make up their minds that they are going to take depositions and send him for trial.

The proceedings in the present case took place as long ago as last November, and the defendant did not apply for leave to move for certiorari until February, so of course no affidavits would be prepared until then. I have no doubt, therefore, that the memories of the justices and their clerk—who have had a great many cases to deal with since then—may be dim; but I think that it is clear from the affidavits that this court ought to find as far as the facts are concerned that the question which was put to the defendant was: "Do you wish to be tried summarily?" I observe that the affidavits filed on the part of the respondents all seem to say: "Everything was done as we always do it; we do "this in the ordinary way." It is most essential that all justices should clearly remember that the question which has to be asked is not "Do you wish to be tried summarily?" but "Do you wish "instead of being tried summarily to be tried by a jury?"

No one would suppose for a moment that the solicitor in the present case did not understand the position, and, I should think without doubt, said to his client: "I hope the bench will deal "with the case," and as soon as he had the chance of electing to be dealt with summarily he took it. But we must emphasize to all benches of justices throughout England that they must follow the provisions which are laid down quite unequivocally in subsection (3) of section 25. They must tell the accused, first, that he has a right to be tried by a jury and, having told him of that right, they must ask him whether he wishes to be tried by a jury. I do not think, provided that the question is asked whether he wishes to be tried by a jury, that any particular form of words need be used; he can be told: "You have a right to be tried by "a jury; do you wish to be tried here or by a jury?" That question must be put in some form, and as the evidence shows here that that question was not put to the applicant, nor that he was informed of his right to be tried by a jury, we reluctantly—because it is a technical point destitute of merits—must quash the conviction.

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[2] [1898] 1 Q.B. 582; 14 T.L.R. 264.

Another point was argued, and at first I thought that it was going to be the main point in the case. When the justices said: "Do you agree to be tried summarily?", the question was answered by the solicitor in the presence of his client: "Yes, "my client accepts this court and pleads Not Guilty." It is said that the solicitor cannot answer the question, and some authority has been cited to us, but it is not really authority, in which there seems to have been an expression of opinion, obiter, in *Rex* v. *Quinn, ex parte Halstead*,[3] where Charles J. said: "The words "have to be addressed to the accused,"—so far I agree—"and "an advocate cannot consent." I do not agree with that. There is nothing in the section about who is to answer the question, and no answer need be made. If the accused is asked if he desires to be tried by a jury, and he does not answer the question, the case will proceed at once as a summary offence unless the justices, knowing that it is a very serious offence, make up their minds to commit for trial, in which case they would not have asked the question but would have treated it as an indictable offence. But I can see no good reason why, if the question which has to be put is asked, the solicitor or the counsel, in the presence of his client, cannot answer the question, because, as I say, the statute does not make it obligatory on the accused to answer the question. If he does not appear, and it is not one of the cases in which he is bound to appear, the question would not be put at all. He must appear himself if he claims trial by a jury; he can answer himself, and I can see no reason why his advocate in his presence cannot answer for him. He can, of course, contradict his advocate at once and say: "I never told my advocate to say that." If he does not, and the case proceeds on a summary consent, which must be shown by his silence, I cannot see any difficulty. But it is not on that ground that we quash the order, but on the ground that the applicant was not informed of his right to be tried by a jury, and the specific question "Do you desire to be tried by a "jury?" was not put.

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[3] (1943) 107 J.P.N. 459.

HILBERY J. I agree. I have nothing to add except to say that justices will not find themselves in any difficulty in this matter if they adopt the formula which was used under the Summary Jurisdiction Act, 1879, for all the years that that Act was in force. There is a form given there which, if it is followed, enables the justices to comply precisely with the requirements of section 25 of the Act of 1952. The form states that the justices should address the accused in the following manner: "You are "charged with an offence in respect of the commission of which "you are entitled, if you desire it, instead of being dealt with "summarily, to be tried by a jury; do you desire to be tried by "a jury?" I agree that this conviction must be quashed for want of jurisdiction.

DONOVAN J. I agree. It may well be that this applicant, represented as he was by a solicitor, really knew that he had a right to be tried by a jury and that these proceedings are an afterthought following conviction. But even so, that does not absolve a court of summary jurisdiction from complying with the provisions of section 25 (3) of the Magistrates' Courts Act, 1952. Those provisions require the magistrates, inter alia, to inform the accused of his right to be tried by a jury, and I think that the conclusion to be drawn from all these affidavits is that that was not done here. All that was done—and apparently as a matter of practice—was to say to the accused: "Do you wish to be tried summarily?" That is asking him whether he wishes to be tried by the magistrates. It is not asking him or telling him that he has a right to be tried by a jury. If a man has a right to be tried by A, he is not told of that right by being asked if he wishes to be tried by B. It is important that the Act should be strictly followed in this respect, though I agree that no particular form of words need be used to state or explain the right of trial by jury.

On the other point I concur that if an accused person is represented by counsel or solicitor and that counsel or solicitor on his behalf and in his presence elects that his client shall be tried summarily or by a jury, that election is effective, and personal election by the client is not essential.

Order of certiorari.

Solicitors: *Beckingsales for William Bache & Sons, West Bromwich; Taylor, Jelf & Co. for Wilson & Sons, Salisbury.*

C. J. E.

BERKELEY *v.* PAPADOYANNIS.

C. A.

1954
Apr. 2, 5;
May 20.

Somervell,
Denning,
Jenkins,
Birkett and
Romer L.JJ.

[Plaint No. J. 2400.]

Landlord and Tenant—Rent restriction—Personal occupation—Sublease of part of premises—Maisonette—Claim by landlord to order for possession of first and third floor, sublet to separate subtenants—Tenant occupying only second floor and box-room on third floor—Subtenants' use of bathroom and w.c. in common with tenant—End of contractual tenancy—Statutory tenancy—Claim by landlord to order for possession of first and third floors—Whether tenant protected by Rent Restriction Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

The defendant, who was the contractual tenant of a three-storey maisonette, sublet the whole of the first floor and all but a small room, used as a box-room, on the third floor, to two separate subtenants, he himself and his wife occupying only the second floor, with the use of the box-room on the third floor. He had at one time occupied both the first and second floors. Both subtenants shared in common with the tenant the use of the bathroom and w.c. There were no structural divisions shutting off from each other the premises occupied by the defendant and his subtenants. At the termination of the contractual tenancy the defendant held over as a statutory tenant. The plaintiffs claimed possession of the parts of the maisonette sublet, on the ground that the defendant had by reason of non-residence lost, as a statutory tenant, the protection of the Rent Acts. The county court judge, deeming himself bound by the decision of the Court of Appeal in *Crowhurst* v. *Maidment* [1953] 1 Q.B. 23; [1952] 2 T.L.R. 723; [1952] 2 All E.R. 808, granted an order for possession. On appeal:—

Held, that *Crowhurst* v. *Maidment* was distinguishable from the present case, because, whereas in *Crowhurst* v. *Maidment* it was conceded that the defendant had never at any material time occupied any part of the sublet premises, or had any intention of ever doing so, in the present case the tenant had at various times during the tenancy occupied parts of the sublet premises and might do so in the future; that the mere fact that the tenant had sublet part of the premises did not raise an implication that the *Skinner* v. *Geary* principle ([1931] 2 K.B. 546; 47 T.L.R. 597) applied to that part; and that the tenant, while remaining in the rest of the premises, had done no more than sublet parts of the maisonette, and had not by so doing forfeited the protection of the Rent Acts.

Quaere, whether the decision in *Crowhurst* v. *Maidment* was given per incuriam, the court not having had cited to it *Baker* v. *Turner* [1950] A.C. 401; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

APPEAL from Judge Reid, sitting at Marylebone County Court.

By a lease dated October 31, 1944, the upper maisonette, No. 256, Randolph Avenue, W.9, was let by a Mrs. Berkeley to the defendant, John Papadoyannis, for three years at a rent of £160 per annum. In 1947, when the lease expired, the defendant held over as a statutory tenant. He and his wife occupied the second floor and also a small room on the third floor which he used as a box-room. He had sublet the other rooms on the third floor and also the two rooms on the first floor to different subtenants, each subletting being furnished. Both subtenants shared, in common with the defendant and his wife, the use of a bathroom and a w.c. The three floors were not structurally shut off one from another. On the death of Mrs. Berkeley in June, 1953, the plaintiffs, her executors, claimed possession of the first floor and the rooms of the third floor not occupied by the defendant, on the ground that by reason of non-residence the defendant had lost the protection of the Rent Acts in respect of the rooms sublet. The county court judge, applying the decision in *Crowhurst* v. *Maidment*,[1] made an order for possession, from which the defendant appealed.

When the appeal came before Evershed M.R., Birkett and Romer L.JJ., on March 25, 1954, counsel for the defendant intimated that he wished to contend (as stated in the notice of appeal) that *Crowhurst* v. *Maidment*[1] had been decided per incuriam being in conflict with the decision of the House of Lords in *Baker* v. *Turner*,[2] which had not been cited to the court. After hearing argument by counsel for the defendant Evershed M.R. directed that the appeal should be adjourned and be heard by a full court of five judges.

R. E. Megarry for the defendant. The question raised by this appeal is whether a statutory tenant who sublets part of his premises thereby loses his statutory tenancy of that part of the premises by reason of non-residence by himself. In other words, can a statutory tenant "*Skinner* v. *Geary*"[3] himself out of a part of his premises by constituting it a separate dwelling? The county court judge decided that the tenant had deprived himself of the protection of the Rent Acts in respect of the two floors which he had sublet, and he founded his decision on the decision of this court in *Crowhurst* v. *Maidment*.[4] It is submitted that that case was wrongly decided, being in conflict with the decision of the House of Lords in *Baker* v. *Turner*.[5] It was also inconsistent with certain previous decisions of the Court of Appeal and in particular *Oak Property Co. Ld.* v. *Chapman*[6] and *Whitty* v. *Scott-Russell*,[7] which were not cited to the court in *Crowhurst* v. *Maidment*.[4] The main issue in *Baker* v. *Turner*[8] was the loss of protection by sharing, but three of the speeches also dealt with the argument that the tenant had lost his statutory tenancy of the part sublet by parting with possession of it, and held that the tenant nevertheless remained protected as to the whole of the premises: see *per* Lord Normand at p. 423, *per* Lord MacDermott at p. 433, and *per* Lord Reid at p. 437. Further, it is well established that if a statutory tenant loses his statutory tenancy by non-residence the tenancy determines automatically without any order of court and cannot be revived by reoccupying the premises [*Brown* v. *Brash*[9]; *John M. Brown Ld.* v. *Bestwick*[10] and *Thompson* v. *Ward*[11] cited]. If a statutory tenant can lose his statutory tenancy of part of the premises by subletting, *Oak Property Co. Ld.* v. *Chapman*[12] is hard to explain, for there a tenant who had sublet the whole in stages was held to be able to grant a new subtenancy of part on regaining possession. *Leslie & Co. Ld.* v. *Cumming*[13] is similar. In *Whitty* v. *Scott-Russell*[14] the cottage had been sublet ab initio, but despite the landlord's contention that in any event he was entitled to possession of the cottage, the tenant was held to be protected as to both house and cottage. The simple principle is that if what is let is a single dwelling-house, either structurally or (as in *Whitty* v. *Scott-Russell*[14]) by contract, the tenant remains protected as to the whole dwelling if he continues to live in part of it, even if he sublets the rest, whether temporarily or permanently. This does not conflict with *Murgatroyd* v. *Tresarden*,[15] where from the start there were two separate dwellings and not one. The mere fact that they were let under one tenancy is immaterial, for they were physically two separate entities when let.

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[1] [1953] 1 Q.B. 23; [1952] 2 T.L.R. 723; [1952] 2 All E.R. 808.

[2] [1950] A.C. 401; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

[3] [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 47 T.L.R. 597.

[4] [1953] 1 Q.B. 23; [1952] 2 T.L.R. 723; [1952] 2 All E.R. 808.

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[5] [1950] A.C. 401; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

[6] [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364; 63 T.L.R. 338; [1947] 2 All E.R. 1.

[7] [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884.

[8] [1950] A.C. 401, 409, 410.

[9] [1948] 2 K.B. 247; [1948] L.J.R. 1544; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[10] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

[11] [1953] 2 Q.B. 153; [1953] 1 All E.R. 1169.

[12] [1947] K.B. 886.

[13] [1926] 2 K.B. 417; 95 L.J.K.B. 1007; 135 L.T. 443; 42 T.L.R. 504.

[14] [1950] 2 K.B. 32, 35.

[15] [1947] K.B. 316; [1947] L.J.R. 631; 63 T.L.R. 62; [1946] 2 All E.R. 723.

Apart from authority, the *Crowhurst* v. *Maidment* [16] doctrine produces strange results. A tenant sublets his upper floor permanently and resides in the lower floor; the subtenant goes, the tenant moves into the upper floor, and then sublets the lower floor permanently. Under the doctrine he lost part of his statutory tenancy with each subletting and has none left [*John M. Brown Ld.* v. *Bestwick* [17] was referred to]. Again, if rent is paid and accepted in respect of the entire premises after a tenant has lost his statutory tenancy over part by permanently subletting it, will a new contractual tenancy be inferred for the whole of the premises, or part, or none? Further, the doctrine seriously impairs the protection which section 9 of the Landlord and Tenant (Rent Control) Act, 1949, appears to confer when a part of the premises is sublet furnished. But for that section *Barrell* v. *Fordree* [18] would be fatal to the tenant's case here, yet *Crowhurst* v. *Maidment* [16] is being used to take away what the section purports to give.

If *Crowhurst* v. *Maidment* [16] is right, it is distinguishable. In that case the tenant never occupied, and never intended to occupy, the parts sublet, whereas here the tenant has occupied the lower two floors and part of the top floor, and has never given up his intention to occupy the first floor again. Nor does there appear to have been any sharing of the bathroom and lavatory in that case; it is important to the tenant in this case to share these rooms with tenants of his own choosing. In any case, if the order stands the landlord will not be entitled to use these rooms or authorize their use as they still remain part of the exclusive demise to the tenant. The presence of the tenant's furniture in the part sublet is another important distinction. The subletting in *Crowhurst* v. *Maidment* [16] was unfurnished and so it was easier to infer a complete parting with possession. [*Hallwood Estates Ld.* v. *Flack* [19] was cited.] Further, the tenancy agreement in this case expressly authorized the subletting of part, and yet the landlord now claims possession because the tenant has done just what was contemplated.

Heathcote-Williams Q.C. and *C. Salmon* for the plaintiffs. The misconception in the defendant's argument is that it was thought to be contended that the mere fact of subletting deprived the tenant of possession of the part sublet. That was never contended by counsel for the plaintiffs. There must be something more than the mere fact of subletting. It has been suggested that there will be hardship if the *Crowhurst* v. *Maidment* [20] principle is allowed to stand. When the fundamental purpose of the Rent Acts is considered there will be no hardship at all. That purpose is to protect a person in the occupation of his house, and if the tenant has evinced a clear intention only to occupy part of the premises as his home the right to protection only extends to that part which he is using as his home. Statutory rights are limited by principles laid down in the Rent Acts, and whatever may have been the relationship of landlord and tenant under the contract, it is quite different when the contractual tenancy comes to an end. The legislature steps in and says one may have only certain rights. Those rights have been decided by the courts. *Barrell* v. *Fordree* [21] was relied on in *Crowhurst* v. *Maidment*.[22] The House of Lords had held that the tenant, having created three separate dwelling-houses, was only entitled to protection in respect of the dwelling-house which he was occupying as his home. In *Crowhurst* v. *Maidment* [22] it is made abundantly clear that if the landlord failed to satisfy the court that the tenant had no intention of returning the tenant would be entitled to retain possession. In none of the cases to which reference has been made has the court deprived the tenant of premises which he was occupying as his home.

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[16] [1953] 1 Q.B. 23.

[17] [1951] 1 K.B. 21.

[18] [1932] A.C. 676; 101 L.J.K.B. 529; 147 L.T. 206; 48 T.L.R. 482.

[19] (1950) 66 T.L.R. (Pt. 2) 368; [1950] W.N. 268.

[BIRKETT L.J. The right to sublet would continue under the statutory tenancy.]

Yes, but only so far as it is consistent with section 15 (1) of the Act of 1920. *Skinner* v. *Geary* [23] really construed section 15 (1), and when one finds that case saying that the fundamental rule of the Rent Acts is to protect only the home all the authorities appear to fall into position and the decision in *Crowhurst* v. *Maidment* [24] is consistent with them. In *Whitty* v. *Scott-Russell* [25] there were two premises let together and the tenant never intended to occupy the cottage, which was never within the Rent Acts. The attack on *Crowhurst* v. *Maidment* [24] is not an attack on *Whitty* v. *Scott-Russell* [25] but on *Skinner* v. *Geary*.[23]

[SOMERVELL L.J. We want you to deal with the question whether *Crowhurst* v. *Maidment* [24] is inconsistent with *Baker* v. *Turner*.[26]]

[20] [1953] 1 Q.B. 23.
[21] [1932] A.C. 676.
[22] [1953] 1 Q.B. 23.
[23] [1931] 2 K.B. 546.
[24] [1953] 1 Q.B. 23.
[25] [1950] 2 K.B. 32.
[26] [1950] A.C. 401.

The contention that *Crowhurst* v. *Maidment*[24] was wrongly decided is an attack on *Skinner* v. *Geary*,[23] which construes section 15 (1) as dealing with the creation of a tenancy of a dwelling-house. It is submitted that it matters not whether a new dwelling-house is created by the tenant out of premises let to him. All that matters is whether he has ceased to occupy that part as his home. He has then lost his status of irremovability. There is no difference between the case where a tenant goes out altogether and where he remains in occupation of one floor and sublets the other. *Haskins* v. *Lewis*[27] is very strongly relied on by the plaintiffs. A tenant in possession may so alter the status of premises that he loses protection.

[BIRKETT L.J. May not the tenant be in occupation by his subtenant?]

Scrutton L.J. in *Haskins* v. *Lewis*[27] said that it must be actual possession and not legal possession. It is submitted that none of the speeches in *Baker* v. *Turner*[28] assists the contention for the defendant, except perhaps that of Lord Reid, which appeared at one point to be breast-high with that contention but then receded away and offered no assistance. Therefore, even if that case had been cited to the court in *Crowhurst* v. *Maidment*[29] it is unlikely that it would have altered the decision in that case.

If, as is submitted, the county court judge has found that there was no intention on the part of the tenant to resume occupation of the other floors, that is a question of fact and therefore a question entirely for him.

Megarry, in reply. *Barrell* v. *Fordree*[30] depends upon the status of the premises being changed quoad tenant as well as subtenant by being let furnished [*Prout* v. *Hunter*[31] was referred to]. The *Skinner* v. *Geary*[32] doctrine, on the other hand, is concerned not with the status of the premises but with the personal rights of the individual tenant. The difference is shown by contrasting *Leslie & Co. Ld.* v. *Cumming*,[33] where the tenant recovered his protection on the furnished status ending, with *Brown* v. *Brash*[34] and *John M. Brown Ld.* v. *Bestwick*,[35] which show that the personal right lost by non-residence is incapable of being revived by reoccupation. The discretionary power to make an order for possession of the whole if part is offered as alternative accommodation is an adequate weapon to prevent the uneconomic use of housing, without any doctrine that the statutory tenancy of part is automatically lost by non-residence. What was said in *Baker* v. *Turner* [36] cannot be explained away as referring to the act of subletting simpliciter, for nobody suggests that mere subletting, without any intention of permanently giving up the part sublet, excludes the Acts, and all the leading cases on the *Skinner* v. *Geary* [32] doctrine were cited; nor do any of the speeches contain the qualifications which on this theory might be expected, e.g., "provided always the subletting does not amount to permanent parting with possession." The limiting words "thereby" and "mere fact" on pp. 435 and 441 were inserted to show that what was being dealt with was the loss of possession point, as distinct from the decontrolling effect of furniture, which had already been dealt with. A tenant who sublets part, furnished, and lives in the other part, still "retains possession" of the whole within section 15 (1) of the Act of 1920, the presence of the furniture and the receipt of the rent of the part sublet sufficing for this purpose. Further, if *Crowhurst* v. *Maidment* [37] is confined to sublet parts which constitute a separate dwelling, section 9 of the Act of 1949 does a cruel kindness to tenants, for it causes parts sublet on a sharing basis to be treated quoad the landlord as separate dwellings, so that a section apparently designed to confer protection will in fact remove protection.

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[27] [1931] 2 K.B. 1.

[28] [1950] A.C. 401.

[29] [1953] 1 Q.B. 23.

[30] [1932] A.C. 676.

[31] [1924] 2 K.B. 736; 132 L.T. 193; 40 T.L.R. 868.

[32] [1931] 2 K.B. 546.

[33] [1926] 2 K.B. 417.

[34] [1948] 2 K.B. 247.

[35] [1951] 1 K.B. 21.

May 20. SOMERVELL L.J. read the following judgment of the court: This is an appeal by the defendant, John Papadoyannis, from a judgment of Judge Reid at Marylebone County Court, dated January 15, 1954, whereby he ordered the defendant to give up possession to the plaintiffs of two rooms on the first floor and three rooms (other than the room used by the defendant as a box-room) on the third floor of the maisonette consisting of the first, second and third floors of the premises known as No. 256, Randolph Avenue, London, W.9.

The plaintiffs sued as executors of a Mrs. Berkeley who died on June 23, 1953. Mrs. Berkeley by an agreement dated October 31, 1944, and made between herself of the one part and the defendant of the other part, let to the defendant the maisonette in question (sometimes referred to as a flat) for three years from October, 1944, at a yearly rent of £160. The agreement included an undertaking by the defendant "not to assign "or underlet the said flat" (i.e., the maisonette) "without the "previous consent of the landlord, provided that the tenant shall "notwithstanding have power to sublet or underlet part of the "said flat," the proviso being interpolated in ink in the typescript.

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[36] [1950] A.C. 401.

[37] [1953] 1 Q.B. 23.

The remaining material facts are sufficiently stated in the following extract from the judgment of the county court judge: "The three-floor maisonette in question comprises on the first "floor two rooms, on the second floor three rooms and on the "third floor four rooms. For these three floors there is one "bathroom and one w.c., both situated on a landing between "the first and second floors of the house. The defendant says "(and I accept his evidence) that the maisonette was at all times "too large for his own occupation but that he took it because he "could not at that time get anywhere else, that he insisted "throughout the negotiations that he should have power to sublet "part of the place and that as the result of his insistence the "proviso to clause 5 . . . was interpolated in ink in the agree"ment before its execution. When in 1947 the original three"year period expired, the defendant held over as a statutory "tenant. He and his wife, whom he married in 1945, have at all "times made their home there and still live there, but do not "occupy, and never have at any time occupied, the whole of the "maisonette. The parts of the maisonette not in their occupa"tion for the time being have from time to time been sublet. "They have always occupied the second floor of the house. For "part of the time they have also occupied the first floor. The "present position is that they occupy the second floor and a small "room on the third floor which they use as a box-room. The "first floor with two rooms, one equipped as a kitchen, the other "a large room, is and has been since September, 1953, let to a "Mr. Cygan, who lives there with his wife. Three rooms on the "top floor (one a kitchen) are and have been let for the last two "and a half years to a Mr. Harrold, who lives there with his "wife. Both lettings are furnished, the first floor tenant paying "£2 and the top floor tenant £3 10s. a week. Rent in each "case includes electricity and each tenant pays for his own gas. "The rent payable by the defendant has from time to time been "increased from the original £160 a year and is now £13 15s. "a month. Both sets of tenants share in common with the "defendant and his wife the bathroom and w.c. The whole "three floors form a self-contained maisonette, distinct from "another maisonette in the lower part of the house, but inside "the maisonette there are no structural divisions shutting off "from each other the premises occupied by the defendant and "his respective undertenants."

The plaintiffs' particulars of claim alleged that they were entitled to possession of the whole of the maisonette; but their claim was in fact limited to those parts of it in respect of which the order under appeal was made, that is to say, the two rooms on the first floor and the three rooms, other than the box-room, on the third floor, which were the parts not occupied by the defendant. They based their claim on two grounds, the first being that the defendant had sublet the first and third floors of the premises, and at all material times had neither occupied nor intended to occupy the first and third floors; and the second being that suitable alternative accommodation was available for the defendant and his family in the shape of the second floor of the premises. The county court judge rejected the second ground, which was not relied on before us and therefore passes from the case.

After disposing of the second ground the judge considered the first in these terms: "I come now to the other limb of the "plaintiffs' argument. They say that since the tenancy agreement expired in 1947 the defendant has had no more than a "statutory tenancy, that is, the right so long as he retains "possession to be protected on the conditions defined by the "Increase of Rent and Mortgage Interest (Restrictions) Act, "1920, s. 15 (1). So far as he has sublet part of the premises "he has ceased to retain possession for the purposes of that "section and has, accordingly, lost his right to protection. In "support of this contention I was referred to *Crowhurst* v. "*Maidment*,[1] a case with facts very similar to those here. What "was involved there was a three-floor house with a different "residence on each floor, as against here a self-contained "maisonette, but in the three-floor house no physical division "into flats had been made any more than in the present case. "The only distinction that I can see is that there the three "floors were separately let as a permanent arrangement whereas "here, that part of the maisonette which the defendant himself "occupies, and those parts which remain available for letting to "undertenants, have to some extent fluctuated. The defendant "and his wife at one time occupied the first and second floors.

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[1] [1953] 1 Q.B. 23.

"They now occupy the second floor and one room on the third. "The defendant told me that that was not a convenient arrangement and that, while he was on excellent terms with his "undertenants and did not contemplate giving either notice, he "hoped, should opportunity occur, again to occupy himself the "first and second floors, in that event, as I understood it, "giving up the box-room on the top floor. The slight degree of "uncertainty which that involves does not, in my judgment, "constitute sufficient to distinguish the present case from "*Crowhurst* v. *Maidment*.[1] I was referred to the Landlord "and Tenant (Rent Control) Act, 1949, section 9 of which was "in operation when *Crowhurst* v. *Maidment*[1] was decided, but "was not referred to there, the underlettings being unfurnished. "I do not see in principle how there can be any distinction "between a statutory tenant who parts with possession to an "unfurnished tenant and one who parts with possession under "a furnished tenancy. In my view, I am bound by *Crowhurst* v. "*Maidment*,[1] and there will be an order for possession in 28 "days of the two rooms on the first floor and the three rooms "(but not the room used by the defendant as a box-room) on "the third floor."

Mr. Megarry, for the defendant, supports his appeal from the judge's decision on three grounds. First, he submits that if the present case is not distinguishable on its facts from *Crowhurst* v. *Maidment*[1] we can and should decline to follow that authority, because, although it is a decision of this court, it is inconsistent with other decisions both in this court and in the House of Lords. Secondly, he submits that the facts of this case are distinguishable from those in *Crowhurst* v. *Maidment*.[1] Thirdly, he submits that on the facts of the present case, and with *Crowhurst* v. *Maidment*[1] out of the way on one or other of his first two grounds, he is entitled to succeed.

We are all of opinion that his second submission succeeds, and that the facts of the present case are distinguishable from those in *Crowhurst* v. *Maidment*.[1] In that case it was conceded (and the concession was the basis of the decision), that the defendant had never at any material time occupied any part of the two upper floors, and had no intention of ever again residing in any part of either floor. There was no such concession in the present case. As appears from the passage already cited from the judgment below, the defendant and his wife have at various times during the tenancy occupied different parts of the house and may continue to do so in the future—including the accommodation or part of it at present occupied by either of the subtenants.

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[1] [1953] 1 Q.B. 23.

Assuming *Crowhurst* v. *Maidment*[1] to be binding on us, it is to be confined to cases where the facts are in accordance with the concession mentioned. The mere fact that a part of the premises has been sublet does not raise an implication that the *Skinner* v. *Geary*[2] principle is applicable to that part. The tenant is fully entitled to suspend any decision as to whether, if any subtenant should go, he would or would not reoccupy the whole or any part of the premises sublet. The tenant, while remaining in the rest of the premises, has done no more here than sublet parts of the dwelling-house. This plainly does not in itself forfeit the protection of the Acts.

In order that Mr. Megarry should succeed in his first submission the court would have to be satisfied that the decision in *Crowhurst* v. *Maidment*[3] fell within one of the three categories set out in *Young* v. *Bristol Aeroplane Co.*[4] Mr. Megarry sought to bring it within either the third or first of these categories or both. He submitted that it was given per incuriam in that it was in conflict with the ratio of *Baker* v. *Turner*.[5] He further submitted that it was in conflict with the rationes of other decisions of this court, namely, *Whitty* v. *Scott-Russell*,[6] *Roe* v. *Russell*,[7] and *Oak Property Ld.* v. *Chapman*.[8]

If we had come to a unanimous conclusion that this submission either succeeded or failed we should have thought it right to consider and decide it. In fact, we differ in our conclusions; and as we are unanimous in thinking that this case is plainly distinguishable we propose to limit this decision to the facts of this case.

For these reasons the appeal will be allowed with costs here and below and judgment entered for the defendant.

Appeal allowed.

Solicitors: *Clifford Symons; Tackley, Fall & Read.*

A. W. G.

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[1] [1953] 1 Q.B. 23.

[2] [1931] 2 K.B. 546.

[3] [1953] 1 Q.B. 23.

[4] [1944] K.B. 718, 728; [1944] 2 All E.R. 293.

[5] [1950] A.C. 401.

[6] [1950] 2 K.B. 32.

[7] [1928] 2 K.B. 117; 44 T.L.R. 278.

[8] [1947] K.B. 886.

1954
May 11, 12.

Upjohn J.
(sitting as an additional judge of the Queen's Bench Division).

GRAND JUNCTION CO. LD. *v.* BATES AND ANOTHER.

[1954 G. No. 167.]

Mortgage—Leaseholds—Mortgage by way of legal charge—Same remedies as mortgage by way of subdemise—Lease forfeited for breach of covenant—User of premises for immoral purposes—Mortgagee's right to relief as underlessee—Assignment of lease of dwelling-house—Temporary occupation of basement by assignor—Whether tenant or licensee—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 87 (1) (2), 146 (4).

Landlord and Tenant—Licence or tenancy.

A mortgagee by way of legal charge has by section 87 (1) of the Law of Property Act, 1925, "the same protection, powers and "remedies" as a mortgagee by way of sub-demise; where, therefore, a lease is forfeited for breach of covenant by the lessee, a mortgagee of the lease by way of legal charge is entitled to relief against forfeiture under section 146 (4) of the Act in the same way as if he were an underlessee.

Dicta in *In re Good's Lease* [1954] 1 W.L.R. 309; [1954] 1 All E.R. 275 applied.

A lease was assigned by the lessee together with furniture for the sum of £2,500, £1,150 of which was secured by a legal charge in favour of the assignor. The assignee was convicted of using the premises for immoral purposes, and the plaintiff landlords brought proceedings claiming possession for breach of covenant. The assignee did not enter an appearance and judgment was signed against her. The assignor claimed relief against forfeiture under section 146 (4) of the Law of Property Act, 1925:—

Held, that the assignor as chargee was by virtue of section 87 (1) of the Act entitled to relief against forfeiture, and that, being a suitable person to whom relief should be granted, an order should be made vesting the lease in him, but without prejudice to any rights which the assignee might have.

ACTION and counterclaim.

The plaintiff company, the Grand Junction Canal Co., claimed possession of premises known as 96, Sussex Gardens, Paddington, in the County of London, against the first defendant, Mrs. Helen Netta Bates, who was the tenant, and against the second defendant, Philip Norman Bennett, chargee of the lease, on the ground that the lease was forfeited for breach of covenant as the premises had been used for an immoral purpose, namely, the keeping of a brothel. The plaintiffs also alleged breach of covenant to repair, and claimed damages and arrears of rent.

Mrs. Bates remained in actual possession of the premises, apart from the basement, which was still occupied by Bennett; she was not represented at the hearing because she had not entered an appearance to the writ, and judgment for possession and for arrears of rent and mesne profits was signed against her on February 18, 1954. Bennett asked for relief against forfeiture under section 146 of the Law of Property Act, 1925,[1] as if he were an underlessee.

In 1951 he had purchased the residue of the lease of No. 96, Sussex Gardens, which had a licence to be run as a guest-house, the lease being due to expire on September 29, 1953, and the rent payable being £200 plus £4 4s. garden rent. The lease was assigned to him and he paid £1,000 for the contents of the house. He went to live on the premises with his wife and four children, and he and his wife ran it as a guest-house for two years. He was a potato salesman to a firm at Covent Garden, whose work took him away from the house from about 8.30 in the morning until about 6.0 or 7.0 at night. In 1953 his wife decided that it was too difficult for her to continue with the running of a guest-house. In the circumstances he decided to sell the lease, and the lease being due to expire in September, 1953, he negotiated a fresh lease with the plaintiffs. During the negotiations the property was put in the hands of a firm of estate agents who introduced Mrs. Bates as a possible purchaser. She was a complete stranger to Bennett, being introduced in the normal way as a person who might purchase the lease. She provided references which were found satisfactory by both Bennett and the plaintiff company.

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[1] Law of Property Act, 1925, s. 87: "(1) Where a legal mortgage of land "is created by a charge by deed "expressed to be by way of legal "mortgage, the mortgagee shall have "the same protection, powers and "remedies . . . as if— . . . (*b*) where "the mortgage is a mortgage of a term "of years absolute, a sub-term less by "one day than the term vested in the "mortgagor had been thereby created "in favour of the mortgagee. (2) "Where an estate vested in a mortgagee immediately before the commencement of this Act has by virtue "of this Act been converted into a "term of years absolute or sub-term, "the mortgagee may, by a declaration "in writing to that effect signed by "him, convert the mortgage into a "charge by way of legal mortgage, "and in that case the mortgage term "shall be extinguished in the inheritance or in the head term as the case "may be, and the mortgagee shall "have the same protection, powers and "remedies . . . as if the mortgage "term or sub-term had remained "subsisting."

S. 146: "(4) Where a lessor is "proceeding by action or otherwise "to enforce a right of re-entry or "forfeiture under any covenant . . . "in a lease . . . the court may, on "application by any person claiming "as underlessee any estate or interest "in the property comprised in the "lease . . . make an order vesting, for "the whole term of the lease or any "less term, the property comprised in "the lease . . . in any person entitled "as underlessee to any estate or "interest in such property upon such "conditions . . . as the court in the "circumstances of each case may "think fit, . . ."

The company agreed to grant Bennett a lease for a term of 14 years, expiring on September 29, 1967, dated June 4, 1953, the rent being increased to £425 payable on the usual quarter days, but reducible to the sum of £375 so long as he should physically reside on the premises and carry on business there.

Clause 2 (14) of the lease contained a clause in common form against assigning, transferring, underletting or parting with possession of the premises, or any part thereof, without the consent of the company, such consent not to be unreasonably withheld, and provided for registration of any assignment or transfer or underletting.

Clause 2 (15) provided: " [The tenant] will not use or permit " or suffer the demised premises or any part thereof to be used " for any illegal or immoral purpose nor without the previous " written consent of the company for any trade business or " profession whatsoever or as separate tenements or flats " whether structurally divided or not but will keep and use the " same only as and for a single private dwelling-house or as and " for letting furnished apartments if and so long as the same be " furnished and kept and used as hereinafter mentioned." There was the usual proviso for re-entry for non-payment of rent or breach of covenant.

On June 10, 1953, Bennett, having obtained the consent of the plaintiff company, assigned the new lease and the residue of the term of the old lease to Mrs. Bates in consideration of the sum of £1,000. The arrangement between the parties was that she should take over the guest-house as a going concern and purchase the furniture for £1,500, making a total consideration of £2,500. £350 of the £1,500 was to be paid and accepted by a promissory note for that sum payable on July 1, 1953, with interest at the rate of 5 per cent. per annum, and the balance of £1,150 was secured on a first mortgage of the assigned premises, together with interest at 6½ per cent. per annum. That mortgage was effected by a document also dated June 10, 1953, made between Mrs. Bates and Bennett, by which in consideration of the sum of £1,150 Mrs. Bates as borrower covenanted with Bennett to repay any principal and interest by monthly instalments of £40. Clause 2 provided: " For the consideration aforesaid the borrower as " beneficial owner hereby charges by way of legal mortgage all "property specified in the schedule hereto with payment in "accordance with the covenants herein contained of the principal "money and interest and other money hereby covenanted to be "paid by the borrower." The schedule contained particulars of No. 96, Sussex Gardens.

By an oral arrangement with Mrs. Bates, Bennett and his family occupied the basement on the payment of £3 10s. a week. The furniture used in the basement was his own furniture, and it was not included in the furniture which was taken over by Mrs. Bates. He had purchased another property which required certain repairs to the plumbing, and the arrangement with Mrs. Bates was intended as a temporary arrangement by which he, and his family, were to stay in exclusive occupation of the basement, on the payment of this weekly sum, until the other premises were ready for occupation. Receipts produced mostly referred to the weekly sum as "rent."

Mrs. Bates continued to carry on the business of a guest-house at No. 96, Sussex Gardens, but during November the police raided the premises and apparently found there some evidence of the place being used as a brothel.

The police called on Bennett, who pointed out that he was only the mortgagee, and that his occupation was that of a tenant and that he had no connexion with the running of the guest-house; and he was not troubled further by them. The day following the raid, he went to his solicitors and told them what had happened; they at once wrote a letter informing the plaintiff company that Mrs. Bates had been arrested on a charge of keeping a brothel.

On December 1, 1953, Mrs. Bates was convicted on a charge of permitting the premises to be used as a brothel and was fined £10 and 5 guineas costs. Notice, under section 146 of the Law of Property Act, was served on her on December 5, 1953, claiming possession on the ground of a breach of the covenant not to use the premises for an immoral purpose, and the writ in these proceedings was issued on January 22, 1954, claiming possession.

On February 13, 1954, she pleaded guilty to a charge of acting in the management of a brothel at 96, Sussex Gardens, but in view of her financial circumstances the magistrate conditionally discharged her for 12 months and ordered her to pay £10 costs.

Cecil Binney for the plaintiff company. As the defendant Bennett had a mortgage only by way of legal charge, he is not entitled to relief against forfeiture under section 146 (4) of the

Law of Property Act, 1925. That subsection is concerned exclusively with relief afforded to an underlessee and its application is confined to a person who can claim as underlessee. By section 86 of the Law of Property Act, mortgage of leaseholds is by sub-demise or by way of legal charge. In the former case the mortgagee is an underlessee, and it is not disputed that he would be entitled to relief under subsection (4) of section 146, but a mortgagee by way of legal charge is not in the position of an underlessee and he should not be so treated. Under section 87 (2) of the Act, a mortgagee whose estate has been converted into a term of years under the Act, could, if he wished, declare that his mortgage was by way of legal charge and not a term of years. A mortgage by way of legal charge has certain advantages not possessed by a mortgage by sub-demise; thus, it is generally considered that a mortgage by way of legal charge does not require the consent of the landlord if the covenant against underletting, assigning or parting with possession of the premises without the landlord's consent does not include the word " charge." A mortgage by way of sub-demise, on the other hand, which affects the legal estate, comes within the scope of the word " underletting," and requires the consent of the landlord: see *Gentle* v. *Faulkner.*[2] A mortgagee by way of legal charge, who is not under this obligation, should not be given the same benefit as a mortgagee by sub-demise.

The only case where this question was discussed was *In re Good's Lease*,[3] where Harman J. said that there was no authority which laid down that relief against forfeiture should be given to a mortgagee by way of legal charge. Although he appears to have thought that a mortgagee by way of legal charge was in the same position as a mortgagee by sub-demise, that dictum is obiter because Harman J. decided that the applicant in that case, the guarantor for payment of rent under a lease, was entitled to call for a mortgage by way of sub-demise or by way of legal charge, and that in the former circumstance he would have been in the position of underlessee. Moreover, he only considered the position of a mortgagee by way of legal charge as between mortgagee and mortgagor, and that case does not therefore decide the question as between a mortgagee and a landlord.

Judgment in default of appearance had been signed against the first defendant, Mrs. Bates.

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[2] [1900] 2 Q.B. 267; 16 T.L.R. 397.

[3] [1954] 1 W.L.R. 309; [1954] 1 All E.R. 275.

Ellison Rich and *Deborah Rowland* for Bennett, the second defendant. *In re Good's Lease* [3] is very close to the present case, and it is relied on in support of the claim that a mortgagee by way of legal charge is entitled to relief under section 146 (4). In that case the applicant had the right to call either for a mortgage by sub-demise or by way of legal charge, and Harman J. said in his judgment, that a person entitled to a mortgage by way of legal charge was in the same position as a mortgagee by sub-demise. The fact that the two exist is for the convenience of conveyancing. The words in section 87 (1) "have the same "protection, powers and remedies" as a mortgagee by sub-demise must mean that the mortgagee by way of legal charge has all the relief of a mortgagee by sub-demise, including relief against forfeiture, for otherwise the words "all protection, powers and "remedies" would be deprived of their meaning and effect. The key word in section 87 (1) is "protection," and if the mortgagee by way of legal charge has not the right to relief against forfeiture he would not have the same protection as a mortgagee by sub-demise.

[Reference was made to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. 1, p. 373; Halsbury's Statutes of England, 2nd ed., vol. 20, pp. 617–8, and Key and Elphinstone's Precedents in Conveyancing, 15th ed., vol. 2, p. 2.]

Secondly, Bennett is entitled to relief in respect of the basement on the ground that his occupation of that part of the premises constitutes a tenancy. He had exclusive possession and paid a weekly rent, for which he produced the receipts; a weekly payment of rent is evidence of a weekly tenancy. There has been a number of cases where the court has had to consider whether an occupation was a tenancy or a licence. The most exhaustive discussion was in *Marcroft Wagons Ld.* v. *Smith*,[4] where it was held that the court must consider the facts of exclusive possession and payment of rent, although it must also consider whether the parties intended to create a tenancy: see also *Errington* v. *Errington* and *Woods*.[5] Those cases were decided under the Rent Restriction Acts. Where, as in the present case, rent has been paid and the occupant has exclusive possession, there is in the absence of any evidence to the contrary a prima facie case of tenancy.

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[3] [1954] 1 W.L.R. 309; [1954] 1 All E.R. 275.

[4] [1951] 2 K.B. 496; [1951] 2 All E.R. 271.

[5] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

Binney in reply. There is no dispute on the law as to the difference between a licence and a tenancy. If there has been any alteration in the law, it is that exclusive possession is not necessarily evidence of a tenancy; it is slightly analogous to the case of a purchaser being let into possession before completion. On the facts here there was no intention to create a tenancy; payment of rent is not conclusive evidence of a tenancy because the word "rent" has always been used for any sort of regular payment. On the facts Bennett's occupation of the basement was only temporary; he did not intend it as a permanent arrangement. No terms were agreed between the parties, and there is no evidence that they intended to create the relationship of landlord and tenant.

UPJOHN J., having stated the facts: I am solely concerned with the position as between the plaintiffs and Bennett, and nothing that I say is intended to prejudice such rights, if any, as Mrs. Bates may have. The first and principal question which I have to consider is whether, by virtue of the mortgage of June 10, 1953, Bennett is a person entitled to claim as an underlessee for the purposes of section 146 (4) of the Law of Property Act, 1925; the point is a fine one, not free from difficulty.

It is conceded that if the mortgage had been by way of sub-demise, the defendant Bennett would have fallen fairly and squarely within the ambit of subsection (4). But he is not a mortgagee by sub-demise; he is a mortgagee by way of legal charge. A mortgage by way of legal charge was a new method of mortgaging property, introduced by sections 85 and 86 of the Law of Property Act, 1925; section 86 is in fact the section concerned with the mortgage of leaseholds. The question is whether, being a mortgagee by way of legal charge, he can claim the benefit of subsection (4) of section 146.

~~It is clear~~ from section 1 (2) of the Law of Property Act, 1925, that a charge by way of legal mortgage creates no estate or term in the property. If there were any doubt about that (but I do not think that there is) it is made abundantly clear by subsection (2) of section 87. If, therefore, the matter rested there, it would be clear that the mortgagee could not claim the benefit of subsection (4). It is argued, however, that section 87 (1) leads to another result. [His Lordship read section 87 (1).] It is said that the effect of that subsection is to put the mortgagee as against the landlord in the position of being a sublessee for the purpose of protecting his mortgage, and that he is therefore entitled to claim relief under section 146 (4) as an underlessee.

The matter has been commented upon by textbook writers: and I was referred to three books where the express point before me was considered. In Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. 1, p. 373, in the notes to section 87 of the Act, and in the notes to the same section in Halsbury's Statutes of England, 2nd ed., vol. 20, pp. 617–618, the editors regard the section as entitling a chargee by way of legal mortgage to the benefit ~~of section 146~~. On the other hand, there is a note in Key and Elphinstone's Precedents in Conveyancing, 15th ed., vol. 2, at p. 2, where the editor regards it as doubtful whether a chargee by way of legal mortgage could claim as an underlessee.

There ~~is one authority on the matter~~, *In re Good's Lease*,[1] recently decided by Harman J., where a guarantor was an equitable chargee of a lease which was forfeited when the lessee was adjudicated bankrupt. The question was whether the guarantor could claim the benefit of section 146 (4). Harman J. decided that the guarantor, being an equitable chargee and one who, in the circumstances, was entitled to call for a legal mortgage, could, as he preferred, call either for a mortgage by sub-demise or for a mortgage by way of legal charge; and in that event, of course, he could call for a mortgage by sub-demise and put himself undoubtedly in a position to exercise the rights conferred by section 146. But before coming to that conclusion Harman J. examined the position as though the guarantor was only entitled to call on the bankrupt to execute a charge by way of legal mortgage, and having referred to section 87 of the Law of Property Act, 1925, he said this[2]: "Therefore, as between him and his mortgagor, he "is in the same position as if he had a mortgage by sub-demise. "I think, on the whole, that it cannot make any difference that "the equitable chargee is entitled under the covenant to have a "charge by way of legal mortgage. He is in the same position "as though he were entitled to have a mortgage direct by sub-"demise." I understand that passage as being an indication of the judge's opinion that even if he were only entitled to have a mortgage by way of legal charge, the guarantor would nevertheless be entitled to claim the benefit of section 146.

Mr. Binney's argument is that a mortgagee by way of legal charge is not an underlessee, which no one disputes; and he says that it would be wrong to give a chargee by way of legal mortgage the benefit of being an underlessee for the purpose now under consideration when for other purposes he gains advantages by not being treated as an underlessee. In support of that argument he referred to the view generally held in the profession that a chargee by way of legal mortgage does not have to obtain the consent of a landlord to a charge where there is a common form clause against assigning, underletting or parting with possession, because it is none of those things; and the consent of the landlord is required only where the word "charge" is added to the prohibitory covenant. He argued, therefore, that a chargee by way of legal mortgage has the advantage, as the lessee does, that the consent of the landlord is not in the normal way required, and that it would be wrong to treat the chargee as being for another purpose, namely, that of obtaining relief under section 146, as a chargee by way of sub-demise.

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[1] [1954] 1 W.L.R. 309; [1954] 1 All E.R. 275.

[2] [1954] 1 W.L.R. 312.

Important

My approach to the problem is this: a charge by way of legal mortgage, as I have already said, was introduced as a conveyancing device by the Law of Property Act, 1925, with a view to simplifying conveyancing, and it would be a pity to introduce subtle differences between one way of creating a charge and another way of creating a charge unless the words of the Act so required. It may be that there is the difference with regard to obtaining consent of the landlord to the charge, though that depends on the construction of the lease; but in any event that is no reason for making another difference between the two forms of creating a security, unless the Act so requires.

Approaching section 87 (1) in that spirit, I find that the mortgagee is to have the same "protection, powers and remedies" as though he had a sub-demise. A lessee by sub-demise undoubtedly has the right to protect his mortgage, where it is of a term of years, by applying for relief under section 146. That is a most important right possessed by a mortgagee by sub-demise, for it may be the only way of saving his security in the hands of some insolvent lessee. The effect of section 87 is, in my judgment, to give the mortgagee, by way of legal charge, this same right, because he has the same protection as if he were an underlessee. I see no ground for confining section 87 to protection, powers and remedies merely as between the mortgagor and the mortgagee; it extends to protection, powers and remedies against all persons—indeed, it is plain that the section includes powers against occupiers and other persons in respect of rents and profits, and I think that the chargee by way of legal mortgage is entitled to say: "I am to be put in the same position as if I had a "charge by way of sub-demise, and in that right, therefore, I can "claim as an underlessee for the purposes of section 146." The defendant Bennett is, in my judgment, therefore entitled to make a claim under section 146.

In those circumstances it becomes unnecessary to consider at length a subsidiary question: what was the true nature of his occupation of the basement and, if he be a tenant, ought relief to be granted? These matters have been fully argued and I think that, without considering them in detail, I ought to express my opinion. Although the point is a fine one, I have on the whole come to the conclusion on the evidence that the ordinary relationship of landlord and tenant was created by the arrangement made with regard to the basement between the defendant Bennett and Mrs. Bates. The former was to have exclusive possession and he paid something called "rent." Neither of those two factors is decisive, but the authorities make it clear that, prima facie, the relationship of landlord and tenant is thereby created; but the parties may, of course, have expressed some different intention, such as that it was only to be a licence for a limited time. This was intended to be an occupation only for a limited time, but on the whole I have come to the conclusion that a tenancy was created. But it is quite a different matter to grant relief; and had I been asked to do so, I should have refused to grant relief from forfeiture in this case. It is conceded that the relief from forfeiture could only go to the basement, and that that would be a rent-restricted tenancy. As I have said, the whole object of the tenancy was for a purely temporary occupation for the few weeks while the plumbing of another house was being repaired for Bennett's occupation.

That is one factor which weighs with me against granting relief; but another factor is that clause 2 (15) compels the lessee to use the premises "as and for a single private dwelling-house "or as and for letting furnished apartments." No consent to this arrangement between the defendants was ever given by the landlord, and the tenancy was therefore in breach of a clause of the lease. That does not disentitle the tenant from asking for relief: see *Imray* v. *Oakshette*,[3] where, however, it was pointed out that the jurisdiction should be sparely exercised. It is plain that the basement will not be a furnished letting, because the furniture belongs to the defendant Bennett, and his continuance there is in continuing breach of clause 2 (15). That is another factor which would weigh with me very much, and for those reasons I should not have been prepared to grant relief with regard to the basement premises. However, that question does not arise.

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[3] [1897] 2 Q.B. 218; 13 T.L.R. 411.

I will now consider the merits of the case. No doubt Bennett will have to pay arrears of rent and for the repairs; and there is also the question whether he ought to pay damages for the acts of immorality which have been carried on there. I must first consider some major submissions made on behalf of the plaintiffs as to his being a suitable person to obtain relief. It was said that if he had known of the immorality that was going on in the premises, he would certainly not have been considered a suitable recipient of relief. It was suggested that in spite of his denials Bennett did know of these acts of immorality. There is one answer to that. I saw him in the witness-box; I thought that he was an admirable witness, absolutely honest, giving his evidence very fairly, and he told me that he did not know of these acts of immorality, and I accept his evidence. It was said that he ought to have known; that he ought to have been on the qui vive to watch out for these things; that he ought, apparently, to have inspected the visitors' book from time to time (a matter which he had no right to do); and generally, so far as I can make out, that he ought to have undertaken some spying activities upon the house. I reject those arguments out of hand. He told me, and I accept it, that he went into the references of Mrs. Bates, as did the landlords, and that they appeared to be perfectly satisfactory; he said that until the raid he had absolutely no idea that anything of that sort was going on. Apart from that, he seems to have been an admirable tenant; his financial circumstances are not in question; he ran the house admirably for the two years he had it, and I should have thought that any landlord would have been glad to have him back. He is, in my judgment, therefore entitled to relief.

As to damages, as I have said, the sum of £168 must at all events be paid as the price of repairing the property, if that claim is persisted in.

Regarding damages for the breach of covenant, one of the employees of the plaintiff company, who was perfectly candid about it, said in evidence that the plaintiff company owned a large number of houses in Sussex Gardens which were alleged to have a reputation for prostitution; there had been convictions for prostitution in other premises in Sussex Gardens and still were from time to time. Damages, in those circumstances, can be little more than nominal; I assess them at £10.

Order vesting the premises in the defendant Bennett as tenant without prejudice to any rights the defendant Mrs. Bates might have, on terms that Bennett paid arrears of rent, damages of £10 *for allowing the premises to be used as a brothel, and damages of* £168 *to be spent (with certain exceptions immediately necessary) over the next three years on repairs. Plaintiffs to pay one-quarter of the defendant Bennett's costs of the whole action (having regard to the attitude taken up by the plaintiffs as against Bennett which his Lordship thought was unreasonable).*

Solicitors: *Bellamy, Bestford & Co.; Wegg-Prosser & Co.*

I. G. R. M.

BLACKMORE *v.* BUTLER.

[Plaint J. No. 262.]

C. A.

1954
Apr. 29, 30;
May 19.

Somervell,
Birkett and
Romer L.JJ.

Agriculture—Agricultural holding—Meaning—Tenancy of farm under written agreement—Subsequent oral tenancy of cottage—Cottage occupied by tenant's farm labourer—Whether cottage an "agricultural holding"—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 1 (1) (2).

When negotiating for a lease of a farm the defendant made it clear to the lessor that he also wanted a tenancy of an adjacent cottage for occupation by one of his farm labourers. The cottage was then occupied by a farm labourer, G., who was employed on a neighbouring farm, and the landlord was reluctant to evict him until alternative accommodation was available. When such accommodation had been found, and G. had left, the defendant took over the tenancy and paid the rent, the cottage being occupied by his farm labourer. The evidence showed that the cottage had always been used to house a farm labourer. The plaintiff, having purchased the cottage at an auction, with full knowledge of the defendant's tenancy, served on him a notice to quit and brought proceedings in the county court for possession. The defendant served on the plaintiff a counter-notice under section 24 (1) of the Agricultural Holdings Act, 1948, claiming (1) that the cottage, together with the farm land, was an agricultural holding within section 1 (1) of the Act, or (2) that the cottage was itself an agricultural holding within the meaning of section 1 (2):—

Held, that the cottage, with its garden, was in itself an agricultural holding within the meaning of section 1 (2), being "land used "for agriculture, which is so used for the purposes of a trade or "business."

Held, further (*per* Birkett and Romer L.JJ.), that the cottage, together with the farm land, did not constitute an agricultural holding within the meaning of section 1 (1), because the language of the subsection, "the aggregate of the agricultural land comprised "in a contract of tenancy," imported only a single tenancy, and in the circumstances of the case there were two distinct tenancies.

Per Somervell L.J. If a second contract is intended and expressed to be subsidiary or supplemental to, or by way of variation of, the main contract, I can, as at present advised, see no reason why the "contract of tenancy" for the purpose of section 1 should not be the original contract as so modified.

APPEAL from Judge Tylor, sitting at Basingstoke County Court.

North Cottage, Sprats Hatch, Dogmersfield, in the county of Hampshire, together with Dogmersfield Farm, were part of property held by the trustees of a Mrs. Anson. The farm had got into a bad condition of cultivation, and as the county agricultural executive committee were pressing the trustees to let the land to a tenant farmer who could be relied upon to put it in good order, Mr. Anson, on behalf of the trustees, in the autumn of 1941 entered into negotiations with F. Butler, the father of the defendant, for a letting of the farm and cottage. F. Butler entered into the negotiations on behalf of his son, Brian F. Butler, and when the tenancy agreement was drawn up and executed in March, 1942, the tenancy was granted to the son. In the course of the negotiations F. Butler had insisted that as a condition of renting the farm he should be given a tenancy of North Cottage for the purpose of accommodating an agricultural worker on the farm.

North Cottage was at that time in the occupation of one Goddard, an agricultural labourer on a neighbouring farm whom the Ansons were reluctant to eject. The cottage was therefore not included in the tenancy, but it was understood that as soon as alternative accommodation could be obtained for Goddard the tenancy of the cottage would be given to the defendant. Alternative accommodation was found for Goddard, and from that date the defendant paid rent for the cottage, which was then occupied by a farm labourer in his employ.

At an auction sale on December 18, 1948, at which the Anson settlement trustees were selling various properties, the plaintiff, Walter Edward Blackmore, purchased North Cottage, which was one of two cottages specified under lot 5 of the particulars of sale and described as "let, together with other land," to the defendant on a yearly Michaelmas tenancy. The plaintiff admitted knowledge of the fact that at the date of the purchase the cottage was let to the defendant for the accommodation of a farm worker.

On September 25, 1952, the plaintiff served on the defendant notice to quit the cottage on or before September 29, 1953, and claimed possession. The defendant, who claimed that the cottage was land used for agriculture or was part of an agricultural holding, served a counter-notice under section 24 (1) of the Agricultural Holdings Act, 1948, claiming the protection of the Act. The county court judge held that the cottage, with its garden, was land used for agriculture within the meaning of section 1 (2) of the Act of 1948,[1] and he therefore dismissed the plaintiff's claim to possession.

The plaintiff appealed.

A. G. de Montmorency for the plaintiff. Section 1 (1) of the Agricultural Holdings Act, 1948, defines an agricultural holding as "the aggregate of the agricultural land comprised in a contract "of tenancy." That means one letting and not, as here, two separate lettings. The tenancy of the farm created a letting of a large holding as distinct from the separate subsequent letting of the cottage. Where there is a separate letting of a cottage to be used only for the purpose of living and sleeping in it, that does not mean that it is being used for agricultural purposes within subsection (2) of section 1. When Goddard went out of the cottage the original agreement could have been reconsidered, and one document could have covered both farm and cottage, but that course was not followed. A separate oral agreement to let a cottage does not make it part of an agricultural holding merely because it is to be occupied by an agricultural labourer. It must be linked with another tenancy which is without doubt in respect of an agricultural holding. The tenancy of the cottage could normally be terminated at the end of September. If there are two letting agreements terminating at different dates it will be impossible to give notice terminating the tenancy of the holding. The judge, it is submitted, came to a wrong decision.

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[1] Agricultural Holdings Act, 1948, s. 1: "(1) In this Act the expression "'agricultural holding' means the "aggregate of the agricultural land "comprised in a contract of tenancy, "not being a contract under which "the said land is let to the tenant "during his continuance in any office, "appointment or employment held "under the landlord. (2) For the purposes of this and the next following "section, the expression 'agricultural "'land' means land used for agri"culture which is so used for the "purposes of a trade or business . . ."
S. 94 (1): ". . . 'Agriculture' "includes horticulture, fruit growing, "seed growing, dairy farming and "livestock breeding and keeping, the "use of land as grazing land, meadow "land, osier land, market gardens and "nursery grounds, and the use of land "for woodlands where that use is "ancillary to the farming of land "for other agricultural purposes, and "'agricultural' shall be construed "accordingly."

E. P. Wallis-Jones for the defendant. The court must look not only at the facts but also at the purpose of the letting of the cottage. The plaintiff purchased the cottage knowing that it had been let to a farmer for agricultural purposes. The purpose of that letting was connected with the tenancy of the farm land, and the two lettings should be regarded as one unit within section 1 (1). Unless there is some compelling reason to the contrary, land includes buildings, and this cottage comes within subsection (2) of section 1, as "land used for agriculture which is so used for "the purposes of a trade or business." Section 94 of the Act gives the widest possible meaning to agriculture. [Reference was made to *Godfrey* v. *Waite* [2] and *Howkins* v. *Jardine*.[3]]

May 19. The following judgments were read.

SOMERVELL L.J. stated the facts, read section 1 (1) and (2) and section 94 (1) of the Agricultural Holdings Act, 1948, and continued: The plaintiff's argument may be summarized as follows. Under section 1 (1) the holding must be contained in a single contract of tenancy. However connected or subsidiary or complementary the subject-matter of a second contract of tenancy may be to a tenancy of agricultural land, it cannot with the subject-matter of the latter tenancy constitute a single holding. That is his answer to the defendant's first contention. On the second point, namely, that the cottage considered by itself is an agricultural holding, the plaintiff does not seek to exclude the surrounding circumstances. He submits that a cottage let for an agricultural worker, however closely connected with the land on which he works, is not within the definition because it is not "used for agriculture." These words necessitate some product or use peculiar to agriculture. A cottage is simply a dwelling-house used as such. There is no element peculiar to agriculture.

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[2] C.A., June 6, 1951 (unreported).

[3] [1951] K.B. 614; [1951] 1 T.L.R. 135; [1951] 1 All E.R. 320.

Similar issues and arguments came before this court in *Godfrey* v. *Waite* [1] in 1951. As that case is unreported I will summarize it. Originally a house, Rodborough Manor, and 32 adjoining acres of farm land, were owned and occupied by the plaintiff's husband. He died and the house was converted into two separate dwelling-houses. The 32 acres were let to the defendant's husband, who at that time lived three-quarters of a mile away. In 1945 one of the halves of Rodborough Manor fell vacant and the defendant's husband, with the defendant, moved in under a lease from the plaintiff. In the spring of 1950 the plaintiff served a notice to quit to expire at Christmas, 1950. The defendant's husband died in September of that year and his widow continued to carry on the business. The defendant maintained that the half of Rodborough Manor let in 1945 was an agricultural holding within the Act. If this were right it was conceded that the notice was ineffective.

In considering the application of the decision to the present case it is important to note the absence in the judgment of any point as to the user of the house for any other purpose than as a residence. There is no indication of any point based on the use of the house for the business of the farm—filling up forms, correspondence and so on. It is treated as premises or land used as a dwelling-house for the farmer, admittedly adjacent to the land farmed. It therefore raised potentially the question of construction whether a dwelling-house can ever be an agricultural holding per se, if held under a separate tenancy.

It was argued in the first place, as here, that the house was so adjacent to and connected with the 32 acres that the whole thing together became one entity, one amalgamated holding, one farm with a farm house. The county court judge had held that it was not so amalgamated, the matter being treated apparently as one of fact and degree rather than of law. This issue was not pursued in the Court of Appeal.

Evershed M.R. then turned to the other way in which the case was put: "We therefore have to consider this case, as I under-"stand it, with our eyes fixed exclusively upon this particular

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[1] June 6, 1951 (unreported).

"tenement, the Rodborough Manor segment, and ask whether "that, not as part of some larger whole, but in itself, is an "agricultural holding. Let me turn again to the definition. The "words are relatively few in number and apparently simple in "expression. Is this holding which I have described, this tenement, 'used for agriculture'? I need not take any further time "in considering the qualification about trade or business, for there "is, I think, no doubt whatever—we certainly have heard no "argument to the contrary—that the farming or agricultural "activities carried on by Mrs. Waite are not carried on as a hobby "or for pleasure, but are carried on for the purposes of trade or "business. So it depends on the meaning of these three simple "words, 'used for agriculture.' In one sense you may say that "anybody carrying on an agricultural activity was using the place "where he lived for agriculture in so far as it could be said that "he must live somewhere, and if he carried on his business while "residing at the particular premises then it could be said in a "general sense that he was using these premises for agriculture: "he was using them for the purpose of carrying on therefrom "his agricultural business at some nearby place. But there "must clearly be some limit to the scope of the phrase in that "connexion.

"In the course of the argument it was asked, supposing that "Mrs. Waite lived in a small house in the main street of Stroud "and went by motor-car or bicycle, or whatever other conveyance she might have available, to her farm property in order "to conduct her business—Stroud is not far away—could it be "contended seriously on those facts that she was 'using her "'dwelling-house for agriculture'? I do not forget, as Mr. Cripps "pointed out, that the word 'agriculture' covers a very wide "amplitude of activities, some of them apparently of a trivial "character. If at this house in the main street of Stroud, or in "the garden at the back, she conducted a business of market "gardening on quite a small scale, it might be said that she was "using that house for agriculture. But if it were so said, it "would be because she was using the garden for the purposes I "have mentioned, and it would have nothing to do with the fact "that she carried on nearby some dairy farming at Manor Farm. "Therefore, if you move the hypothetical dwelling-house nearer "and nearer to the Manor Farm and further and further from "Stroud, until you eventually reach the position when the two "things are adjacent, does there come a point when you have, so

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" to speak, crossed the line, and because of geographical propin- " quity you must then say that the place where Mrs. Waite lived " is used for agriculture? If you do, are you so saying because by " reason of its position it has become part of the farm? Putting " the case in that way, it seems to me to indicate that this " apparently simple inquiry is apt to become very much a matter " of degree and a question for the trial judge prima facie to " determine as a matter of fact in each particular case."

The Master of the Rolls then considered the county court judge's findings. He had in effect found that there was no intention to let the house as a farm house for the 32 acres. It was a more convenient dwelling-house. It was, therefore, not an agricultural holding. This was upheld. The importance is that the question was held to be one of fact and degree. If it had been let as a farm house for use in connexion with the farm, the county court judge could and should have decided that it was an agricultural holding. It was also recognized that the purpose might alter during the currency of the contract.

On this basis it seems to me clear that there was evidence in the present case on which the county court judge could find that the cottage was an agricultural holding. Indeed, it is difficult to see how any other conclusion could be reached once it is clear that as a matter of law a dwelling-house as such may be " land " used for agriculture."

The judge rejected the first contention. He held that as there were two contracts there could not be one holding. It is unnecessary to decide whether this is of universal application. If a second contract is intended and expressed to be subsidiary or supplemental to or by way of variation of the main contract I can as at present advised see no reason why the " contract of " tenancy " for the purpose of section 1 should not be the original contract as so modified. It might indeed be unreal not so to apply the words of the section. I would dismiss the appeal.

BIRKETT L.J. The questions for decision in this appeal arise out of the plaintiff's claim for possession of a cottage at Dogmersfield known as North Cottage, which he bought in the year 1948. [His Lordship referred to the facts and continued:]

When the plaintiff purchased the cottage he knew that the defendant was the tenant, and that the occupier of the cottage was a farm worker of the defendant, and that he worked on the farm of which the defendant was the tenant. In answer to the plaintiff's claim for possession in the county court, the defendant pleaded in paragraph 2 of the defence: "The defendant holds "the said premises as part of an agricultural holding, alternatively as an agricultural holding, and claims that as such he "is entitled to the protection of the Agricultural Holdings Act, "1948." By section 24 of that Act, where notice to quit is given to the tenant of an agricultural holding, and the tenant serves a counter-notice, the notice to quit has no effect save under the conditions set out in subsection (2); and in the case before us, it is agreed that the notice to quit which was given by the plaintiff is ineffective if the cottage is an agricultural holding. Section 1 (1) of the Agricultural Holdings Act defines agricultural holding as being "the aggregate of the agricultural "land comprised in a contract of tenancy." Section 1 (2) of the Act defines agricultural land as "land used for agriculture "which is so used for the purposes of a trade or business. . . ."

The two questions on which this appeal turns, and which were decided by the county court judge, are these: 1. Can the defendant's tenancy of the farm, made in 1942, and his tenancy of the cottage, made in 1947, be regarded as a contract of tenancy within the meaning of section 1 (1) of the Act of 1948? 2. If not, can the cottage itself, with its garden, be regarded as agricultural land within the meaning of section 1 (2) of the Act, and so qualify to be an agricultural holding itself? The county court judge answered the first question in the negative and the second question in the affirmative, and in my opinion he was right in both answers.

The contract of tenancy referred to in section 1 (1) of the Act is, I think, a single contract of tenancy, and on the facts of the present case the county court judge was plainly right in saying that there were two distinct tenancies, the written agreement for the tenancy of the farm in 1942, and the oral agreement for the tenancy of the cottage. I do not think, therefore, that it is possible to say, on the facts of this case, that the defendant holds the cottage as part of an agricultural holding consisting of the farm and the cottage, and that they are the aggregate of the agricultural land comprised in a contract of tenancy so as to satisfy the provisions of section 1 (1) of the Act. I think that the facts of each case would have to be examined to see whether there was a contract of tenancy to satisfy section 1 (1) of the Act. Cases may arise, of course, where after the original contract of tenancy, other agreements are entered into either adding to or subtracting from the land in the original tenancy, and it will be a question for consideration in each case whether such agreements may be read together with the original contract of tenancy and form the contract of tenancy referred to in section 1 (1) of the Act; but on the facts of the present case I think that the county court judge was right in saying that there were here two distinct contracts of tenancy which could not be so regarded.

On the second question the county court judge considered the definition contained in the Act of 1948 and asked himself whether this cottage, in all the circumstances of the case, could properly be described as an agricultural holding within the meaning of the Act. Could the cottage and garden be properly described as agricultural land, that is land used for agriculture, within the meaning of section 1 (2)? Undoubtedly the chief consideration in the mind of the county court judge was the use which had been made of the cottage at all times. It has already been pointed out that the bare fact that a cottage was occupied by an agricultural worker would not by itself make the cottage agricultural land. The county court judge took the view that the cottage was at least "land," and the question he had to decide was whether it was agricultural land. He considered the facts as to the use made of the cottage at all material times, and found that it had always been used to house an agricultural worker and had never been used for any other purpose. He considered the situation of the cottage in relation to the farm, and also the evidence that when the farm was first let the father of the defendant had wished the cottage to be included in the tenancy because of its situation and because of its use.

Although, for the reasons already stated, this could not be done, the judge observed that if it had been possible to do this and make the cottage part of the original letting, nobody would have doubted that it was an integral part of the holding, and not something merely incidental thereto. The fact that the cottage was occupied at all times by a farm worker does not stand in isolation; it is related to the history of the use of the cottage and the land, and stamps the cottage with a definite character; and I think that the judge was right in deciding that the cottage in all the circumstances of the case came within the definition of an agricultural holding. I agree that the appeal ought to be dismissed.

Romer L.J. I agree and am of the opinion that the county court judge was quite right on both the issues which he determined. The first was whether the defendant's tenancy of the farm land and his tenancy of the cottage constituted together a "contract of tenancy" within the meaning of that phrase as used in section 1 (1) of the Agricultural Holdings Act, 1948. In my opinion the judge was plainly right in deciding that the two tenancies were separate and distinct and that the premises comprised therein formed two holdings and not one. One may test the matter in this way. If the rent of the cottage had fallen into arrear the landlord could have levied a distress upon the defendant's goods in the premises but he could not have distrained on the livestock or agricultural machinery on the farm. This in itself shows that in the eye of the law the tenancies were distinct from one another—as indeed they were in fact, the defendant holding the land under a written agreement and the cottage under an oral agreement or arrangement of a different date.

It was argued, however, that, even so, the two agreements were in substance one, inasmuch as the defendant (or his father) made it a condition of his leasing the land that he should have a tenancy of the cottage as well, as soon as its then occupant, Goddard, should vacate it. It is true, I think, that the defendant may have had a sufficient equitable interest in the cottage, arising from Anson's acceptance of this condition, to have entitled him to an injunction restraining Anson, when Goddard left, from letting the cottage to anyone else other than himself. This cannot, however, have the effect of merging the two contracts of tenancy into one; and in my opinion section 1 (1) of the Act, in speaking of "a contract of tenancy" is envisaging only one contract and not two or more, as is shown by (inter alia) sections 8, 23 and 24 of the Act.

It is true that if further agricultural land is added to land already comprised in an existing lease by an instrument which is supplemental thereto and applies its provisions to the extra land, there would be only one "contract of tenancy" for the purposes of section 1; but nothing of that kind was done in the present case; on the contrary, not only did the original tenancy agreement of March 10, 1942, make no reference to the cottage, but the later agreement which the parties entered into on August 26, 1947, was wholly confined to the land and made no mention at all, as it very well could have done, of any agreement to let the cottage when the departure of Goddard should make it available. I am accordingly unable to see how, on any view, the defendant's right to possession of the farmlands and cottage respectively was attributable to only one "contract of tenancy."

There remains the question whether the cottage, by itself, was "used for agriculture" (which I take to mean "used for the "purpose of agriculture" or "used in connexion with agriculture") so as to constitute agricultural land. It is, of course, clear that the mere fact that a dwelling is occupied as a residence by a person who is an agricultural worker, or who is otherwise engaged in agricultural pursuits, is not in itself sufficient to constitute that dwelling agricultural land. The unreported case of *Godfrey* v. *Waite* [2] is sufficient authority for that. Moreover, the contrary view would lead to one of two results: either that once the dwelling had been occupied by such a person it would be stamped for evermore with the character of agricultural land, which would be absurd, or that it would be within or outside the Act of 1948 from time to time, according to whether its occupier was such a person or not—a conception which this court in *Howkins* v. *Jardine* [3] declined to accept.

Nevertheless, once it is conceded, as the plaintiff rightly did concede, that the cottage is "land," I can entertain no doubt but that, having regard to all the relevant circumstances, it is "agricultural land" within section 1 of the Act. Set as it seems to be in the midst of pastures and farmlands it has, at all material times, so far as is known, been used for the purpose of housing agricultural workers. We were told that the whole time Goddard lived in it he worked for a tenant farmer, though not on the land which was farmed by the Butlers. The defendant wanted it for a similar purpose, and it was not suggested that the cottage had ever been let for the accommodation of any different type of worker. Taking, then, the history of this cottage into account, its situation and the purpose for which it was let to the defendant, in my opinion it follows almost inevitably that it is "agricultural land" and that the judge was right in so deciding.

I accordingly agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Bulcraig & Davis; Hollest, Mason & Nash, Farnham, Surrey.*

A. W. G.

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[2] June 6, 1951 (unreported).

[3] [1951] 1 K.B. 614; [1951] 1 T.L.R. 135; [1951] 1 All E.R. 320.

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May 11, 12,
13, 14;
June 3.

Singleton,
Denning and
Morris L.JJ.

SOUTHPORT CORPORATION *v.* ESSO PETROLEUM CO. LD. AND ANOTHER.

[1951 S. 3864.]
[Southport Registry, 1951 S. 105.]

Shipping—Nuisance—Discharge of oil—Public navigable river—Tanker stranded in estuary—Refloated by jettison of oil cargo—Damage to foreshore by oil—Action by owners of foreshore against shipowners —Claim based on trespass, nuisance and negligence—Negligence—Res ipsa loquitur—Onus of proof.

Shipping—Collision—Negligence—Onus of proof. Negligence—Onus of proof—Res ipsa loquitur. Trespass—Indirect act. Nuisance. Practice—Pleadings—Omission—Due to other party's reticence.

Owing to a defect in her steering gear an oil tanker belonging to the first defendants became stranded in the estuary of a river. In order to prevent the ship from breaking her back the second defendant, the master of the vessel, jettisoned 400 tons of her oil cargo, which was carried by the tide to a foreshore belonging to the plaintiffs and caused considerable damage. The plaintiffs brought an action against the owners and master of the tanker based on trespass, nuisance and negligence, alleging that the stranding of the tanker was caused by the faulty navigation by the master for which the owners were vicariously responsible. By their defence the defendants denied negligence, and at the hearing their case was that the faulty steering was due to the stern frame being cracked or broken, but no evidence was called by them to show how that condition had been brought about. Devlin J. found that there was no negligence by the owners or the master of the vessel and that the plaintiffs were not entitled to succeed either in nuisance, trespass or negligence. The plaintiffs appealed:—

Held (*per* Singleton and Denning L.JJ., Morris L.J. dissenting), that the circumstances of the case were such that the doctrine of res ipsa loquitur applied and the onus was on the defendants to explain why the steering gear of the ship went wrong. As they had failed to do so the owners of the vessel were liable to the plaintiffs in negligence.

Dictum of Erle C.J. in *Scott* v. *London and St. Katherine's Docks Co.* (1865) 3 Hurl. & Colt. 596 applied.

The Merchant Prince [1892] P. 179; 8 T.L.R. 430 considered.

Per Denning L.J. The plaintiffs could not succeed in a claim based on trespass since to support such an action the act done by the defendant must be a physical act done by him directly to the plaintiffs' land: but they could succeed in a claim based on nuisance. The discharge of oil into the sea in such circumstances that it was likely to be carried on to the shore to the prejudice and discomfort of H.M. subjects was a public nuisance, and a person who suffered greater damage therefrom than the generality of the public would have a right of action. In such an action,

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once the nuisance was proved and the defendant was shown to have caused it, the burden was on him to excuse or justify it, and to do that in the present case the defendants must show that it was unavoidably necessary to discharge the oil, but such a defence would not avail them if they failed to prove that the unavoidable necessity was not attributable to their negligence.

Per Morris L.J. I think that there may be trespass if something is thrown upon land or if the force of the wind or of moving water is employed to cause a thing to go on to land.

Decision of Devlin J. [1953] 3 W.L.R. 773; [1953] 2 All E.R. 1204 reversed.

used case of Jones v Llanrwst [illegible] Radcliffe [illegible] the H of L

Appeal from Devlin J.,[1] sitting with an Elder Brother of Trinity House as assessor, at Liverpool Assizes.

The facts, which are fully stated in the judgment of Singleton L.J., were shortly as follows: The first defendants, Esso Petroleum Co. Ld., owned a small tanker, the *Inverpool*, of which George McMeakin, the second defendant, was the master. On December 3, 1950, the *Inverpool* left Liverpool at 7.30 a.m. with a cargo of heavy fuel oil. At about 3.15 p.m., owing to a defect in the steering, she took a heavy sheer to starboard, which could not be corrected, and ran aground on the revetment wall. The master, fearing that the tanker would break her back—with probable loss of life as well as of the vessel—ordered the discharge of the oil in order to refloat her. The oil became deposited on the foreshore and on a marine lake belonging to the plaintiffs, Southport Corporation, and extended for about seven-and-a-half miles, and varied in thickness from 1 inch to 3 inches, and in width from 3 feet to 20 feet, at one point amounting to 100 feet.

The plaintiffs sought to recover damages from the defendants in respect of the loss and damage which they had suffered, basing their action in trespass, negligence or nuisance. In regard to their claim for negligence, they alleged that the stranding of the vessel was attributable to the negligent navigation of the second defendant for which the owners of the ship were vicariously responsible. The defendants denied negligence or that they had committed a trespass or created a nuisance. Devlin J. held that the plaintiffs had a cause of action in trespass or nuisance as well as in negligence, but that they were not entitled to succeed on those heads of claim in the absence of negligence, which he held had not been proved against either of the defendants. He accordingly gave judgment in their favour.

The plaintiffs appealed.

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[1] [1953] 3 W.L.R. 773; [1953] 2 All E.R. 1204.

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K. S. Carpmael Q.C. and *A. E. Baucher* for the plaintiffs. The decision of Devlin J. was wrong and the plaintiffs were entitled to succeed in their claim against the defendants. The plaintiffs' case alleged three causes of action, namely, trespass, nuisance and negligence. Devlin J. was of opinion that the plaintiffs had a cause of action in trespass and nuisance as well as in negligence, but that in the absence of proof of negligence they were not entitled to succeed on any of the causes of action alleged. He said that the only ground of negligence alleged was that of faulty navigation on the part of the master of the *Inverpool* for which the first defendants, as owners, were vicariously responsible, and since in his (Devlin J.'s) opinion the plaintiffs had failed to establish negligence by the master, no cause of action had been made out. It is not now suggested that the master should have been found guilty of negligence, but it is submitted that in the circumstances of the case, namely, that the steering gear of the ship had gone wrong, the onus shifted to the defendants to give some explanation of how that occurred without some negligence on their part: see *The Merchant Prince.*[2] In other words, the ship having got on to the revetment wall in circumstances which were not of an abnormal character, the case was one of res ipsa loquitur and the onus shifted to the defendants to prove an absence of negligence on their part. No evidence to that effect having been called by them, the plaintiffs were entitled to succeed.

[SINGLETON L.J. What is the best authority which shows the proper answer to a claim based on res ipsa loquitur?]

It is submitted that the principles applicable are correctly stated in Salmond on Torts, 11th ed., pp. 516, 517: "The maxim "res ipsa loquitur applies whenever it is so improbable that such "an accident would have happened without the negligence of the "defendant that a reasonable jury could find without further "evidence that it was so caused": see *Scott* v. *London and St. Katherine's Docks Co.*[3] Where the maxim applies the onus shifts to the defendant and it is for him, if he can, to persuade the court or jury that the accident arose through no negligence of his. In the present case the stranding of the *Inverpool* on the revetment wall, in the circumstances prevailing, constituted prima facie evidence of negligence, and no evidence was given for the defendants to show that it was not attributable to any want of care on their part. They failed, therefore, to discharge the onus on them and were accordingly liable to the plaintiffs. [Reference was also made to *Woods* v. *Duncan* [4] and *Laurie* v. *Raglan Building Co.*[5]]

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[2] [1892] P. 179; 8 T.L.R. 430.

[3] (1865) 3 H. & C. 596.

H. I. Nelson Q.C. and *G. B. H. Currie* for the defendants. The decision of Devlin J. was right and the defendants were not liable to the plaintiffs for the damage done by the oil. The first case made by the plaintiffs was that through the negligent navigation of the *Inverpool* by the defendants' servants a trespass was committed by the jettisoning of the oil for which the first defendants were vicariously responsible. No allegation was made against the defendants except in respect of the acts of their servants.

[SINGLETON L.J. The case really comes back to the question whether there was initial negligence on the part of the defendants. If, on the facts, no case of negligence is made out, I do not think that the plaintiffs can succeed. It is not necessary, in my opinion, to consider trespass or nuisance.]

If oil is discharged out at sea and floats on to the foreshore it is not a trespass, since to constitute such a cause of action there must be some physical act done directly to the plaintiffs' land. If a prima facie trespass is established, there can be only one defence, namely, that of necessity, and Devlin J. said that a defence of necessity could not be made out if there was some sort of negligence connected with it, and he held that in the present case there was no negligence on the part of either of the defendants which gave rise to the necessity for jettisoning the oil. The plaintiffs were also not entitled to succeed on the claim based on nuisance. There could not be a private nuisance, because to establish such a cause of action it must be shown that the defendant had used his own or some other person's land in such a way as to affect the plaintiff's enjoyment of his own land. Nor was what the defendants did a public nuisance, because there was no interference with the general rights or comfort of the public.

[SINGLETON L.J. The act of the defendants in allowing the escape from the ship of oil which might come on to the land of the plaintiffs would not be wrongful if it was done for the purpose of saving life unless the necessity for the jettisoning of the oil was attributable to the negligent act of the defendants, so the case comes back to the question of negligence.]

The fact that the vessel got across the revetment wall in the condition of storm prevailing does not raise a prima facie case of negligence or allow the doctrine of res ipsa loquitur to apply. Once the case has been tried, all question of res ipsa loquitur vanishes, and when all the evidence has been heard the only question is whether negligence can be inferred from the facts established. Devlin J. decided that it could not, and it is submitted that his decision is unchallengeable. The rule laid down in *The Merchant Prince* [6] that in circumstances somewhat similar to those in the present case the onus is shifted to the defendants to show that the happening was due to inevitable accident and was not attributable to negligence on their part does not apply in the present instance, where the facts were very different from those in *The Merchant Prince*.[6] If, as is submitted, there was no shifting of the onus on to the defendants to prove inevitable accident, the only question is whether there was evidence on which Devlin J. could find the defendants guilty of negligence, and it is submitted that he was clearly right in holding that there was no evidence on which he could so hold. [On the question of res ipsa loquitur, see also *Woods* v. *Duncan*,[7] and in particular the observations of Viscount Simon,[8] Lord Russell of Killowen [9] and Lord Simonds.[10]]

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[4] [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420.

[5] [1942] 1 K.B. 152.

K. S. Carpmael Q.C. replied.

Cur. adv. vult.

June 3. The following judgments were read.

SINGLETON L.J. This case concerns a small tanker called the *Inverpool*, belonging to the defendant company, which stranded in the Ribble estuary on December 3, 1950; and the master, in order to float her, discharged about 400 tons of fuel oil. The oil became deposited on the foreshore which belongs to the plaintiffs, the Southport Corporation, and entered the Marine Lake, a feature of the foreshore. The deposit extended for a distance of about seven-and-a-half miles, and varied in thickness from 1 inch to 3 inches, and in width from 3 feet to 20 feet, at one point amounting to 100 feet. It became necessary to close the Marine Lake for a time and also parts of the foreshore, and it has cost the corporation a substantial sum to make good the damage.

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[6] [1892] P. 179.
[7] [1946] A.C. 401.
[8] Ibid. 419.
[9] Ibid. 425.
[10] Ibid. 439.

The corporation claimed damages against the owners and master of the tanker. They alleged that the deposit of oil on their property constituted a nuisance, or was a trespass, and, further, that there was negligence. Devlin J. gave judgment in favour of the defendants, and the plaintiffs appeal to this court.

I take the following statement of facts from the judgment of Devlin J.: "The *Inverpool* is a steam tanker of 680 tons gross, "169 feet in length and 31 in beam. The engine is aft. Her "master, George McMeakin, and her chief engineer, Mackintosh, "are both experienced seamen, and she was manned by a crew of "11 hands all told. She left Liverpool at 7.30 a.m. on December "3, 1950, with a cargo of 736 tons of heavy fuel oil. She has "three tanks and her total capacity is 800 tons. She carried "about 120 tons only in her No. 1 tank forward, and the other "two tanks were full. Her draft forward was 9 feet 10 inches "and aft 14 feet 10 inches. She arrived at the Nelson Buoy at "11.40 and waited there for the tide: high water at Preston was "at 17.17. She left the Nelson Buoy at 14.30, the weather then "being clear, wind N.N.W. force 7 or 8, and a moderately rough "sea. At about 14.45 when she was between the Gut Buoy and "the Wall End Buoy she shipped two or three very heavy seas "over the port quarter and engine room. Up to that time she "had been behaving normally in every way, and almost "immediately after that, the master says, the steering without "any apparent cause became very erratic, and she began "sheering four to five points to starboard and to port. The "engineer describes her as lurching badly, sliding from side to "side. The master said the weather made it impossible to put "a man along the deck to find out what was wrong with the "steering gear. He asked the engineer to increase the pressure "to the steering. The master continued on his course with some "anxiety. At 15.05, when the ship was about halfway between "Wall End Buoy and Salter's Buoy, the engineer felt two "violent blows on the propeller (metal hitting metal, it sounded "like) which he reported to the master. The ship was then, the "master says, in mid-channel, and he did not think she had "touched anything. The channel at this part is about 600 feet "wide. On the south side there is a revetment wall about 7 or "8 feet in width and of a height varying from 3 to 6 feet above "datum. At this time there would be about 14 or 15 feet of "water at Salter's Buoy, so that there was 8 to 12 feet of water "over the wall. When the *Inverpool* had passed Salter's Buoy

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" —about half a mile, the master says, though the plaintiffs " contend she had hardly passed it—she took a heavy sheer to " starboard which could not be corrected and she ran aground on " the revetment wall. It was then 15.15. She lay at right " angles across the wall, about 30 feet of her length being over " the other side of it while her stern was still afloat in the " channel. The master did the obvious and natural thing and " ordered the engines full astern so as to back her off into the " channel. Immediately the engines went astern it was found " that the propeller was fouling some hard object; there was the " same noise as before. There was such vibration that the " engineer feared the main steam pipe might fracture with the " danger of scalding the engine crew. After a few minutes he " reported this to the master, who told him he could stop. The " master then regarded the position of his ship as extremely " precarious. She was pounding on the wall and straining " heavily. He thought she was in serious danger of breaking her " back with probable loss of life as well as of the ship herself. " Of course, she was on a rising tide, and there was a chance, " great or small, that the water would lift her off. If the tide " made to the predicted height (and in fact it was an inch over) " there would be 6 or 7 feet more water under the vessel within " the next two hours. But the tide and the wind were pushing " her on to the wall, and that would probably mean that she " could not get off except by getting right over. The water would " therefore have to rise enough to get her stern over, and her " stern was drawing 14 feet 10 inches. If the height of the wall " where she was across it was, say, 5 feet, high tide would give " her a theoretical clearance of about 1 foot. If the height was " 6 or 7 feet, as the master rightly or wrongly thought, the tide " would not get her off. If it did not, her position, bumping on " a falling tide with her head and stern unsupported, would be " disastrous. I do not think that the master made any precise " calculations. His instinct was to get off as quickly as he could " and the obvious way to do that was to lighten her. He had no " relish for waiting about doing nothing to see if the tide would " rescue him. At 15.25, therefore, he began discharging No. 1 " tank. There was some suggestion that he lightened her forward " first with the idea of putting her further down by the stern and " thus inducing her to slide back into the channel. In fact he " had to discharge that tank first because it was slack, and I do " not think he was concerned about which way she came off so " long as he got her off. The discharge of No. 1 was completed "at 16.05 without getting the ship off the wall. At 16.15 he "began on No. 3 tank, and when that was completed he had discharged rather over 400 tons and raised the ship about 3½ feet "At 17.30 she bounced along the wall (to use the master's "description) and went off it, coming to rest on a bank of sand. "A survey report made later showed quite considerable hull "damage which the ship must have sustained either on the wall "or on the hard sand. The report showed also that the stern "frame was very badly bent and fractured in two places, that "one blade of the propeller was completely broken off and the "other three blades broken at the tip."

In order to make clear what the weather conditions were, I add the following: The master of the *Inverpool* said that when he left the Nelson Buoy he was quite happy about going in. There were two other vessels near her, both of which made the journey up the channel to Preston. One was the *Esso Suwannee*, a motor tanker belonging to the defendant company. Her master, who gave evidence for the defendants, said: "They (the "conditions) were not too good. The wind was blowing from the "Nor'-West and there was a fairly big sea. . . . I thought the "passage was quite negotiable. There was a bit of wind and you "had to keep her up to the wind when going past the buoys. ". . ." Later, he agreed that it was "not an unusually bad "weather afternoon but more than normal." The other vessel was the *Clydebrae*, whose master was also called on behalf of the defendants. He said that when he left the Nelson Buoy soon after the *Inverpool* left, it was blowing a moderate gale and it was a pretty rough sea. In cross-examination he said that it was the kind of weather you would frequently experience whether entering Preston or elsewhere.

The plaintiffs alleged that the master of the *Inverpool* was guilty of negligent navigation in several respects, including (*a*) in entering the channel when the steering was erratic and the helm could not be got over and was slow to move; (*b*) in that the tanker was caused to strike the revetment wall; (*c*) in that he caused about 400 tons of oil to be discharged overboard. Devlin J. rejected this part of the plaintiffs' case. He came to the conclusion that it was a defect in the steering gear which caused the vessel to get out of control and which led to her coming upon the wall. He added: "The remaining point is much more difficult, "because it has not proved possible to arrive at any clear con-"clusion as to what caused the defect in steering. It remains, "the master said, a puzzle and a mystery to him. The plaintiffs "say, therefore, that the defendants have failed to prove that "they were not responsible for the loss. I approach the problem "by considering first what relevant damage was found on the "ship at her survey. The propeller blades were broken and so "was the stern frame. If the stern frame was fractured, or "even cracked, it would be quite enough to account for the ship's "behaviour. Is there sufficient evidence to support the inference "that the stern frame was fractured before the vessel stranded? "I think on the whole that there is. The damage could, of "course, have been done as she was crossing the wall or after-"wards on the sand. But if I accept, as I do, the engineer's "evidence of the propeller fouling on two occasions when the "stern was still afloat, first between Wall End Buoy and Salter's "Buoy, and secondly just after the stranding, it points to the "damage being done earlier. On both occasions it sounded as if "the propeller was striking metal. That suggests that in two "different places in the channel it was the same sort of metal "object that was being struck, and therefore that it was a metal "object that was travelling with the ship. The defendants' "theory that the propeller was fouling a part of the stern frame "that was loose or out of alignment fits in with this, and the "theory is certainly not weakened by the fact that the stern "frame was afterwards found to be fractured. I accept this "theory and find as a fact that the stern frame was fractured "before 15.05 when the propeller first fouled. I find that the "fractured stern frame was the cause of the vessel getting out "of control. Is there evidence to show how the stern frame was "fractured? The defendants' theory is that it was done by the "two or three very heavy seas that she shipped at about 14.45. "Assuming the stern frame to be sound, I cannot see how heavy "seas could by themselves fracture it, and I am advised by the "Elder Brother that they could not. They could, of course, if "they drove the stern frame up against some hard object. The "Elder Brother points out that between the Gut Buoy and the "Wall End Buoy, just about the bar, there are places where "the ship would not have much water under her stern, and "suggests as a possibility that the stern frame might have been "broken against the bed of the channel. This hypothesis was "not advanced at the trial and I feel now that it is too specula-"tive for me to adopt in the absence of any supporting evidence "from the master or engineer. The plaintiffs' theory is that "the fracture was caused by the vessel striking the revetment "wall owing to negligent steering at some point before that at "which she grounded. I do not accept this. In the first place "I am advised that it is unlikely that she could have struck "the wall in such a way as to damage her stern; the plaintiffs' "theory was put to the defendants' witness, Evans, and the "Elder Brother considers that Evans's opinion on this point is "correct. In the second place, I do not think it could have "happened without the knowledge of the engineer, whose evidence "I accept. Thirdly, it certainly could not have happened without the master's knowledge; and while I do not want to decide "the matter simply by accepting his evidence, the circumstances "do not point to his telling a lie and I do not feel that he was. "The evidence of the master of the *Clydebrae*, a following ship, "for what it is worth, bears out his story. On the evidence I "am unable to say how the stern frame fractured. I may add "that I do not accept the theory that the vessel's loss of control "was due to sea damage done to some part of the steering gear "such as the rods and chains along the deck. As in the case of "the stern frame, I am advised that it is unlikely that the sea "alone could do any serious damage. If it had, I should have "expected it to be found in the survey; if there were any signs "of it there, my attention was not drawn to them."

I am not sure upon the evidence that it is right to say that the stern frame was fractured before the propeller first fouled, though it may have been so. Equally it may have been that the stern post was loose and that the fracture or fractures occurred later.

[His Lordship reviewed the evidence of the master and continued:] The defendants by their defence had denied negligence, and they had further denied the creation of trespass or nuisance. They had not pleaded that the difficulty in steering arose through a loose stern frame or a damaged stern frame. Their case on the hearing was that the damage was done by two or three heavy seas shipped about 14.45. The finding of Devlin J. upon this point is: "Assuming the stern frame to be sound, I cannot see "how heavy seas could by themselves fracture it, and I am "advised by the Elder Brother that they could not." The natural inference is that there was something wrong with the stern frame before the commencement of the voyage. What, then, is the position in law? The submission made to the trial judge by Mr. Carpmael was that in the circumstances the defendants must explain the accident, or must show that the defect in steering was not their fault, and he relied upon *The Merchant*

Prince.[1] Mr. Nelson, on behalf of the defendants, submitted that no question of fitness of the ship entered into the case, as the only plea of negligence was directed against the master.

I do not think that the decision in this case ought to turn on any question of pleading. If it had to do so, I should not regard the defendants' pleading as complete in view of the facts known to them. Moreover, I would not think that there had been full discovery of documents, and the plaintiffs could know little of the facts which were within the knowledge of the defendants. It was really only on cross-examination of the master that the plaintiffs discovered the facts as they now appear.

I look upon the case in this way: the stranding of the vessel on the revetment wall was an unusual happening, something not likely to happen even in bad weather in this channel if proper care was taken. Other vessels made the journey successfully. Thus an explanation is called for from the defendants. I think this was the opinion formed by the judge. He appears to have considered that it was a case in which the doctrine of res ipsa loquitur applied, and he said: " If the defendant offers a plausible " explanation consistent with his diligence, the plaintiff is back " where he was before and must show the greater probability of " negligence." Unfortunately he did not apply that principle to the facts of the case, for he ended his judgment by saying that the only negligence alleged was against the master in respect of negligent navigation. Thus he may be said to have determined the case on a question of pleading. If the defendants had pleaded that the trouble arose through looseness of, or a fracture of, the stern frame, there might have been a reply, and without doubt further discovery would have been sought. On the judge's findings the damage was caused by the fractured stern frame, which could not have been caused by heavy seas if the stern frame had been sound. This was a vessel which was said to have been new in 1925. It would appear that her stern post became loose, or the stern frame fractured, before she entered the channel. There is no evidence to show that that sort of thing happens in a well found ship. It seems to me that we ought to assume that it is unlikely that such a thing will happen if proper care is taken.

We know nothing as to the history of the *Inverpool.* No earlier survey reports have been produced. We do not know when repairs had last been done to her, though there is a somewhat nebulous remark as to her having been overhauled in the previous March or April. Nor is there any information as to what the condition as to possible looseness of the stern post was found to be afterwards. Mr. Carpmael said that, relying upon his submission, he left it to the defendants to show that they had taken proper care.

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[1] [1892] P. 179; 8 T.L.R. 430.

Is the explanation given by the defendants a plausible one consistent with diligence, to take the question posed by Devlin J.? It is unnecessary, in my view, for the plaintiffs' case to be put in the way Fry L.J. put it in *The Merchant Prince*.[2] I prefer the test laid down by Erle C.J. in *Scott* v. *London and St. Katherine's Dock Co.*[3]: "There must be reasonable evidence "of negligence. But where the thing is shown to be under the "management of the defendant or his servants, and the accident "is such as in the ordinary course of things does not happen if "those who have the management use proper care, it affords "reasonable evidence, in the absence of explanation by the "defendants, that the accident arose from want of care."

That appears to me to be the position on the facts of the present case. If the defendants have produced a reasonable explanation, equally consistent with negligence or no negligence, the burden of proving that the defendants were negligent and that their negligence caused the damage rests upon the plaintiffs. Have the defendants produced such an explanation? Mr. Nelson, on their behalf, submitted that it cannot be said that there is evidence of negligence whenever a vessel goes ashore in a storm. From that proposition, stated in general terms, I do not dissent. But the weather was not unusual: there is nothing to indicate that there were unusual, or unexpected, difficulties in the channel, or under the conditions encountered on that day. Other vessels made the journey up the channel successfully. It appears that the trouble arose through some fault in the stern post, or in the stern frame, of the vessel. There was no evidence to show that that is something which may happen in a well found ship if proper care has been exercised in regard to her; indeed, no evidence was directed to this side of the case. The defendants were content to rely on the fact that the master noticed nothing wrong with the steering until after the heavy seas were shipped. There is no evidence of any inspection, routine or other, beforehand.

In *The Llanover*,[4] Bucknill L.J. said: "On the undisputed

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[2] [1892] P. 179.

[3] (1865) 3 H. & C. 596, 601.

[4] (1945) 79 Ll.L.R. 159, 163.

"evidence as to the circumstances leading up to the collision, it "seems to me that a prima facie case of negligence is made out "against the *Llanover* which she has to rebut. Her rebuttal "rests on her evidence that her steering gear jammed, which "made it impossible for her to keep out of the way. It is not "sufficient for a ship to say: 'My steering gear has jammed and "'therefore I can do nothing.' I think the burden is cast on her "of showing that the jamming could not have been avoided by "the exercise of reasonable care and skill on her part, or at any "rate that she used all reasonable care and skill to prevent the "jamming of the gear, and that it might reasonably have "jammed for a cause which they could not have prevented by "the exercise of reasonable care and skill."

I find that statement of Bucknill L.J. most helpful. In the circumstances of the present case, I cannot see that the defendants gave an adequate explanation of the happening, in the absence of any evidence to show what the condition of the stern post, or of the stern frame, was at any time prior to the day of the stranding and without any evidence to show how the damage might have occurred, or as to what the condition of the parts was afterwards. They directed evidence to show that the steering might be affected by heavy seas, but they gave no evidence as to the likelihood of damage to the stern post or stern frame. It is not without interest to notice that no evidence was given in chief by the defendants' witnesses as to this damage being the cause of trouble occurring in the steering; it was in the cross-examination of the master that it appeared. It cannot have come as a surprise to the defendants.

It appears to me that on the facts the plaintiffs did give evidence which pointed to negligence on the part of the defendants, and that the case was not answered. I have come to the conclusion that the plaintiffs' claim should succeed, and that the appeal should be allowed.

I do not propose to consider the claim made on the basis of nuisance or trespass. Assuming that either is right, the defence of necessity would, in my view, destroy it. But, again, the defendants could not avail themselves of that defence if the whole trouble was due to their negligence. And it is on the issue of negligence that the case falls to be decided.

I would add that I cannot accept Mr. Nelson's submission that no duty is owed by those on, or responsible for, a ship to persons, whether owners or occupiers, on shore. There is a duty to act reasonably—in other words, a duty not unnecessarily to do an act which any reasonable person in charge of a ship would know to be likely to cause injury to those on shore. In my opinion, judgment should be entered for the plaintiffs with damages to be assessed.

No distinction was drawn between the position as between the defendants, but as the judge acquitted the master of any negligence in the navigation of the ship it may be better that judgment should be entered against the owners, though if any question arises upon that we will hear counsel.

DENNING L.J. This is one of those cases, rare nowadays, where much depends on ascertaining the proper cause of action, particularly in regard to the burden of proof. The Southport Corporation alleges that the deposit of oil on their foreshore was either a trespass to land, or a nuisance, or that it was due to negligence. The judge seems to have thought that it did not matter much what was the proper cause of action; it all came back in the end to the universal tort of negligence. The action was, he said, "to be treated in the same way as any running "down or collision case in which the plaintiff alleges negligence." I do not share this view, and will give my reasons:

(1) *Trespass to land.* In order to support an action for trespass to land the act done by the defendant must be a physical act done by him directly on to the plaintiff's land. That was decided in the year 1498 in the *Prior of Southwark's* case,[5] which is conveniently set out in Fifoot's History and Sources of the Common Law at p. 87. The prior complained because the defendant, who was a glover, had made a lime pit for calf-skins so close to a stream as to pollute it. It was held that if the glover had dug the lime pit in the prior's soil the action ought to be in *trespass*; but if it was made in the glover's soil it should be in *case*. The same distinction was taken in *Reynolds* v. *Clarke*,[6] where the defendant put a rainspout on his house from which water poured on to the walls of the plaintiff's house and rotted them. The plaintiff brought an action for *trespass*, but failed because he should have brought an action upon the *case*. The reason was because the prejudice to the plaintiff was not immediate, but consequential. Quite recently, in *Read* v. *J. Lyons & Co. Ld.*,[7] Viscount Simon L.C. affirmed the same distinction when he

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[5] (1498) Y.B. 13 Hen. 7, f. 26, pl. 4.

[6] (1726) 1 Str. 634.

[7] [1947] A.C. 156, 166; 62 T.L.R. 646; [1946] 2 All E.R. 471.

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observed that "the circumstances in *Fletcher* v. *Rylands*[8] did "not constitute a case of trespass because the damage was consequential, not direct." Applying this distinction, I am clearly of opinion that the Southport Corporation cannot here sue in trespass. This discharge of oil was not done directly on to their foreshore, but outside in the estuary. It was carried by the tide on to their land, but that was only consequential, not direct. Trespass, therefore, does not lie.

(2) *Private Nuisance.* In order to support an action on the case for a private nuisance the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land. "The ground of responsi- "bility," said Lord Wright in *Sedleigh-Denfield* v. *O'Callaghan*,[9] "is the possession and control of the land from which the nuisance "proceeds." Applying this principle, it is clear that the discharge of oil was not a private nuisance, because it did not involve the use by the defendants of any land, but only of a ship at sea.

(3) *Public Nuisance.* The term "public nuisance" covers a multitude of sins, great and small. An instructive collection of precedents will be found in the third volume of Joseph Chitty's Criminal Law, published in 1826. Suffice it to say that the discharge of a noxious substance in such a way as to be likely to affect the comfort and safety of Her Majesty's subjects generally is a public nuisance. That was decided in *Regina* v. *Mutters*,[10] where the owner of a quarry in Torquay, whilst blasting out the rock, put an excessive amount of gunpowder into a hole, and the ensuing explosion was so great as to scatter rocks and stones into the houses and gardens of people in the neighbourhood and on to the road. He only did it on one isolated occasion, but he was convicted at the Devon Sessions of a public nuisance, and a strong court consisting of Pollock C.B., Willes J., Channell B. and Byles and Shee JJ. upheld the conviction. This recalls the celebrated case of *Scott* v. *Shepherd*,[11] where the defendant threw a lighted squib into a crowded market house, and it was thrown from one stallholder to another until it put out the plaintiff's eye. The defendant there was, I think, guilty of a public nuisance, and the plaintiff could have sued him in *case*. Blackstone J. thought that *case*, and not trespass, would lie against Shepherd, and I agree with him. Those cases concerned, it is true, the discharge of explosives which affects the safety of Her Majesty's subjects,

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[8] (1866) L.R. 1 Ex. 265.

[9] [1940] A.C. 880, 903; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[10] (1864) L. & C.R. 491.

[11] (1773) 2 W.Bl. 892.

whereas the discharge of oil only affects their comfort; but that is only a distinction in the kind of the nuisance, not in the principle of it.

Applying the old cases to modern instances, it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried on to the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects. It is an offence punishable by the common law. Furthermore, if any person should suffer greater damage or inconvenience from the oil than the generality of the public, he can have an action to recover damages on that account, provided, of course, that he can discover the offender who discharged the oil. This action would have been described in the old days as an action on the case,[12] but it is now simply an action for a nuisance. I realize that by a statute passed in 1922 the discharge of oil in navigable waters has been made an offence punishable summarily; but that does not mean that it is not also a public nuisance by the common law.

Applying these principles, it seems to me plain that the discharge of 400 tons of oil into the estuary of the River Ribble was a public nuisance. It would, inevitably, be thrown up on some part of the coast. Indeed, the master accepted the likelihood of the oil reaching the Southport foreshore. The defendants can, therefore, properly be called upon to account for it.

(4) *Burden of Proof.* One of the principal differences between an action for a public nuisance and an action for negligence is the burden of proof. In an action for a public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on to the defendant to justify or excuse himself. If he fails to do so, he is held liable, whereas in an action for negligence the legal burden in most cases remains throughout on the plaintiff. In negligence, the plaintiff may gain much help from provisional presumptions like the doctrine of res ipsa loquitur, but, nevertheless, at the end of the case the judge must ask himself whether the legal burden is discharged. If the matter is left evenly in the balance, the plaintiff fails. But in public nuisance, as in trespass, the legal burden shifts to the defendant, and it is not sufficient for him to leave the matter in doubt. He must plead and prove a sufficient justification or excuse.

(5) *Justification or Excuse.* The defendants seek to justify themselves by saying that it was necessary for them to discharge

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[12] Anon. (1535) Y.B.Mich. 27 Hen. 8, f. 27, pl. 10; Fifoot 98.

the oil because their ship was in danger. She had been driven by rough seas on to the revetment wall, and it was necessary to discharge the oil in order to get her off. If she had not done so, lives might have been lost. This is, no doubt, true at that stage in the story, but the question is, how came she to get upon the wall? If it was her own fault, then her justification fails, because no one can avail himself of a necessity produced by his own default. Where does the legal burden rest in this respect? Must the Southport Corporation prove that the ship was at fault in getting on to the wall, or must the ship prove that she herself was not at fault? In my opinion the burden is on the ship. She does not justify herself in law by necessity alone, but only by unavoidable necessity, and the burden is on her to show it was unavoidable.

Public nuisance is, in this respect, like unto a trespass, as to which it was said by the Court of King's Bench as long ago as 1616 in *Weaver* v. *Ward*[13] that no man shall be excused " except " it may be judged utterly without his fault." The court added that, as a matter of pleading, it is for the defendant to " set forth " the case with the circumstances so that it shall appear to the " court that it was inevitable and that the *defendant committed* " *no negligence* to give occasion to the hurt." To the same effect is *Dickenson* v. *Watson*,[14] where the defendant, who was a tax collector on his rounds, discharged a gun and put out the plaintiff's eye. The court held " that the defendant shall not " be excused without unavoidable necessity, which is not shown " here." To take a modern instance, if a cricketer hits a ball out of the ground and it falls on to the head of someone walking along the road—or on to someone's greenhouse—he is liable in trespass. He could not hope to show that it was an unavoidable necessity for him to hit the ball so hard.

Those were, it is true, cases in trespass; but the same principle applies to cases of public nuisance. That is shown by *Tarry* v. *Ashton*,[15] where a lamp which projected over the Strand fell on to a passer-by. This was described by Lord Wright as a private action for a public nuisance: see *Sedleigh-Denfield* v. *O'Callaghan*.[16] Another example is *Wringe* v. *Cohen*,[17] where the gable of a house next the highway was blown down in a storm (which was treated by this court as a public nuisance). In both cases the defendant was held liable because his premises were in a defective state. He did not know of the defect, and he was not negligent in not knowing, but, nevertheless, he was liable because he did not prove any sufficient justification or excuse. He did not prove inevitable accident. Likewise in *Sadler* v. *South Staffordshire and Birmingham District Steam Tramways Co.*[18] a tram going along the highway ran off the track because the points were defective. The jury acquitted the tramway company of negligence, but they were held liable because they could not prove inevitable accident.

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[13] (1616) Hobart 134.

[14] (1682) Jones (Sir T.) 205.

[15] (1876) 1 Q.B.D. 314.

[16] [1940] A.C. 880, 906.

[17] [1940] 1 K.B. 229; 56 T.L.R 101; [1939] 4 All E.R. 241.

Applying these cases, I am of opinion that the defendants can only escape liability if they can prove that the discharge of oil was an unavoidable necessity; that is, a necessity which arose utterly without their fault. In other words, that they committed no negligence to give occasion to it.

(6) *The failure of the steering.* The question is, therefore, whether the ship has proved that it was not her fault that she got on the wall. She has given the circumstances in which she got there. Her steering gear had failed half an hour previously. She was lurching about in the channel out of control and finished up on the wall; but why did her steering gear fail? She has never attempted to explain it. The judge thinks it failed because the stern frame fractured. No one can doubt that the stern frame should not have fractured. Why did it fracture? The seas themselves were not rough enough to do it. There must have been some other cause, but what was it? Several suggestions have been made. It may be that she hit the bed of the channel. It may be that there was a latent defect in the metal. It may be that there was a patent defect which could have been discovered by reasonable examination and inspection. But whatever the cause, the defendants have not shown that it happened without their fault. They have, therefore, not discharged the burden upon them. They are liable for the nuisance which they caused. That is sufficient for the decision of this case, but I proceed to consider the case in negligence.

(7) *The rule in The Merchant Prince.*[19] Although in negligence the legal burden in most cases remains throughout on the plaintiff, nevertheless there are some exceptional cases where the legal burden is shifted on to the defendant. It is shifted in those cases which fall within the rule in *The Merchant Prince.*[19] In that case a steamship under way in broad daylight ran into a ship at anchor in the Mersey. No one can doubt that if it

[18] (1889) 23 Q.B.D. 17.

[19] [1892] P. 179.

was done deliberately it was a trespass. Alternatively, if the steamship was out of control by her own fault in a crowded river, with the steering gear jammed, she was a public nuisance. In the further alternative, if she was in control and nevertheless ran into a ship at anchor, she must have been negligent. Those being the only possible alternatives, it appeared on her own showing that her steering gear was jammed and she was out of control. She was, therefore, called upon to answer for her dangerous condition as if it had been a public nuisance. That is how Sir Walter Phillimore put it in argument when he said [20]: "The machine was dangerous and the defen-"dants are liable for using it in a crowded river like the Mersey." The Court of Appeal accepted his argument and put the legal burden fairly and squarely upon the defendants. The cause of action was laid only in negligence, but the facts shifted the legal burden on to the defendants just as if it were a case of trespass or public nuisance. Lord Esher M.R. said [21]: "He can only get "rid of that proof against him by showing inevitable accident, "that is by showing that the cause of the collision was a cause "not produced by him, but a cause the result of which he could "not avoid." That decision followed an earlier decision to the like effect by Lord Herschell L.C. in *The Annot Lyle*,[22] and it has since been repeatedly applied both in the Court of Admiralty and in this court, notably in *The Dageid.*[23] I do not think we should admit of any doubt upon a rule which is at once so just and so convenient. It applies not only to a ship at sea, but also to a lorry or a horse and cart which gets out of control and runs off the road into a house. If there is no other traffic about, the legal burden is on the defendant to prove inevitable accident: see *Michell* v. *Allestry* [24]; *Illidge* v. *Goodwin*,[25] *per* Tindal C.J.; and *Hendry* v. *M'Dougall.*[26] The fact of running into the house calls not merely for an explanation consistent with diligence, as McCardie J. thought in *Gayler and Pope Ld.* v. *Davies (B.) & Son Ld.*,[27] but for proof of inevitable accident. I realize that in *Fletcher* v. *Rylands* [28] and *River Wear Commissioners* v. *Adamson* [29] Lord Blackburn seems to put the burden rather differently; but that was before *The Merchant Prince* [30] had settled the law upon the point.

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[20] [1892] P. 179, 183.
[21] Ibid. 187.
[22] (1886) 11 P.D. 114.
[23] (1947) 80 Ll.L.R. 517.
[24] (1676) 3 Keb. 650.
[25] (1831) 5 C. & P. 190, 192.
[26] 1923 S.C. 378, 385, 386.
[27] [1924] 2 K.B. 75; 40 T.L.R. 591.
[28] (1866) L.R. 1 Ex. 265, 286.
[29] (1877) 2 App.Cas. 743, 767.
[30] [1892] P. 179.

Applying *The Merchant Prince*,[31] we find here that the ship ran on to the revetment wall. If the steering gear was in order, that was plain negligence. The ship seeks to escape from this charge of negligence by saying that her steering gear had failed and she was out of control. But that is no answer unless she proves—and the legal burden is on her to prove—that it was no fault of hers that the steering gear had failed. She has not discharged that burden, or even attempted to discharge it. She is, therefore, liable.

(8) *Res ipsa loquitur.* If, contrary to my view, the legal burden was on the Southport Corporation throughout to prove that the ship was in fault, I must say that the facts, to my mind, speak for themselves. The steering gear of the ship went wrong. It ought not to have gone wrong if those having the management of the vessel used proper care. The defendants have not given any explanation of how it could go wrong, consistent with due diligence. Surely, if they had had proper examinations and surveys of the ship, the stern frame would not have fractured. The inference of negligence should, I think, plainly be drawn. I agree with all that Singleton L.J. has said on this part of the case.

(9) *The pleadings.* The defendants say that they came to the court to meet a charge of negligent navigation on the part of the master; not a charge of negligent inspection and overhaul by the owners. This point so impressed the judge that he decided in their favour on account of it. I do not agree with it. The plaintiffs made a prima facie case of negligent navigation by the master by showing that he went on to the wall. The defendants in their pleading sought to attribute that to the steering gear being out of control because the propeller had twice struck "some object." That would lead anyone to think that it struck a submerged object such as a rock or a piece of wreckage. No one would think that they were referring to a fractured stern frame. If they had done so, the plaintiffs would, no doubt, have retorted with the charge that they should not send a ship out in such a condition that the frame might fracture. The defendants cannot complain of omissions in the plaintiffs' pleading when it was their own reticence which led to it.

I may add that, even on this point of pleading, *The Merchant Prince* [31] is in the plaintiffs' favour, because I have referred to the record of the case and find that the plaintiffs there only pleaded negligent navigation. They pleaded that the *Merchant*

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[31] [1892] P. 179.

Prince struck the *Catalonia* a heavy blow; that a good look-out was not kept; that the *Merchant Prince* neglected to keep clear of the *Catalonia*; that she was being navigated at too high a rate of speed; and that she did not stop or reverse her engines. Nothing was alleged about a defect of the machinery or bad management of the machinery. Yet the plaintiffs succeeded because negligence in that respect was not disproved by the defendants.

(10) In conclusion I would say that the Southport Corporation know nothing of what happened on board the ship except that it discharged oil which polluted their foreshore. It is only just and reasonable that the shipowners should pay the cost of cleansing the foreshore unless they can show that they were no way in fault; and that they have not done. I am of opinion that whether the case is put in nuisance or negligence, the plaintiffs should succeed. I would allow the appeal and enter judgment against the defendant company.

MORRIS L.J. The voyage of the *Inverpool* on December 3, 1950, was at first uneventful. Leaving Liverpool at 7.30 in the morning, bound for Preston, she arrived at the Nelson Buoy at 11.40. It was necessary to wait for the rising tide: The weather was "a bit too rough for dropping the anchor," and so Captain McMeakin turned the vessel round, head to sea, put her on "slow," and kept marking time for nearly three hours off the buoy. The steering of the vessel had been, and continued to be, normal. It was, apparently, too rough for the pilot boat to come out. At 14.30 the vessel started to make her way towards the channel of the Ribble. The time of starting required to be determined by relation to the time of the high water at Preston. No suggestion is made that the timing was in any way wrong. The *Inverpool* proceeded at half-speed. The Gut Gas Buoy, which is about two miles from the Nelson Buoy, was passed, and then at about 14.45, while proceeding towards the Wall End Buoy, two or three very heavy seas were shipped. An immediate result, and one which surprised Captain McMeakin, was that the steering suddenly became very erratic; the vessel began to sheer both to starboard and to port; the sheering was to an extent of about 4 points. At about 15.05, when the vessel was about half-way between the Wall End Buoy and Salter's Buoy, came the incident, reported by the engineer to the captain, when there were two violent blows on the propeller which sounded like metal hitting metal. Ten minutes later the vessel ran aground on the revetment wall.

The situation then was fraught with great danger. The lives of those on board were in peril; the ship was in jeopardy. In the predicament then existing the decision of the captain to pump out oil was manifestly justified. In the result lives were saved. The vessel went over the wall and came to rest on a bank of sand. The fate of the vessel was in the balance for some days thereafter during which it seemed doubtful whether she would again ride her element, but eventually she was refloated and was towed to Preston on December 8.

Gratitude for deliverance, apart from other instincts, might have inspired a desire to reimburse the Corporation of Southport the amount of the expense to which they were put in clearing the oil which came unwanted and unwelcome to their shore and to their lake. The misfortunes which befell the owners of the ship arose in the course of their commercial pursuits; the Corporation of Southport had no concern in the carriage of the oil—save than that it should be carried securely. But considerations other than the legal ones are not for the court and may not be fully known. After correspondence had taken place, in the course of which the owners of the *Inverpool* stated that she stranded during very heavy weather in circumstances outside the control of the master and crew and repudiated the suggestion that there had been negligence in the navigation, management and control of the vessel, legal proceedings were begun against the owners of the ship and her captain.

The shores and other property of the Southport Corporation are in proximity both to the sea and to the channel of the Ribble. Those who own seashores or land near the sea are inevitably subject to certain hazards. If a ship founders in a gale or is blown ashore and battered by the elements, the shore may be strewn with debris or with cargo; the consequences may be disagreeable. But this is a risk which is recognized both in fact and, I think, in law. If the *Inverpool* had been caught in a hurricane and had been sunk, and if her whole cargo of oil had been carried to and precipitated on the Southport shore, and if no fault were alleged against the ship, I cannot think that in law the corporation would have a claim; they would not be able to assert negligence, and it would not avail to complain of nuisance or of trespass. They would be enduring one of the risks to which the owners of property so situate are subject. The law was

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stated by Blackburn J. in *Fletcher* v. *Rylands*,[32] where he said[33]: "Traffic on the highways, whether by land or sea, "cannot be conducted without exposing those whose persons or "property are near to it to some inevitable risk; and that being "so, those who go on the highway, or have their property "adjacent to it, may well be held to do so subject to their taking "upon themselves the risk of injury from that inevitable danger; "and persons who by the licence of the owner pass near to "warehouses where goods are being raised or lowered, certainly "do so subject to the inevitable risk of accident. In neither "case, therefore, can they recover without proof of want of care "or skill occasioning the accident; and it is believed that all the "cases in which inevitable accident has been held an excuse for "what prima facie was a trespass, can be explained on the same "principle, viz., that the circumstances were such as to show "that the plaintiff had taken that risk upon himself."

It was doubtless with a recognition of this position that the corporation sought to establish that there had been negligence in the navigation, management and control of the vessel. They alleged that the master had been negligent. In the statement of claim they further pleaded that the defendants were liable for nuisance and trespass. But in the circumstances of this case I do not think that the claim of the plaintiffs is advanced by the inclusion of these words: liability can only attach, in my judgment, if there was negligence. If the ship, while sailing in placid seas near Southport, had for no good reason deliberately decided to pump out a quantity of oil on to the sea and had done so in circumstances under which, by the action of the tide or the wind, the oil would be carried on to the Southport shore, I consider that there would have been a good cause of action in trespass or nuisance. There may be trespass if something is placed upon land; but equally I think that there may be trespass if something is thrown upon land or if the force of the wind or of moving water is employed to cause a thing to go on to land: see the judgment of Parker J. in *Jones* v. *Llanrwst Urban District Council*.[34]

In the illustration that I have supposed, the affliction of the owners of the land would not be of the kind or quality to the risk of which those owning property near to the sea would deem themselves or ought reasonably to be subject. Such a deliberate and unwarranted outpouring could not be regarded as being a natural incident of navigation. It is true that in the present case when the *Inverpool* was stranded on the wall the decision to pump out oil was a calculated one. The plaintiffs contended that the decision was unreasonable and need never have been taken. After hearing the evidence the judge rejected this contention. In my judgment he rightly rejected it. In the situation in which the ship was placed it was necessary and proper to jettison. But the plaintiffs advanced further contentions by reference to an earlier phase in the story. On the assumption that having got on to the wall it was necessary to jettison, they urged that the vessel ought never to have got on to the wall, for, they said, she ought never to have entered the channel. The issue so raised required a consideration of much evidence. Devlin J. came to the conclusion that the allegation that it was negligent to enter the channel (having regard to what had happened to the ship at and after 14.45) also failed. Every other allegation of negligence likewise failed. I see no reason to differ from the conclusions of fact reached by the judge in regard to all these allegations.

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[32] L.R. 1 Ex. 265.

[33] Ibid. 286.

[34] [1911] 1 Ch. 393; sub nom. *Isgoed Jones* v. *Llanrwst U. D. C.*, 27 T.L.R. 133.

If the plaintiffs had in effect simply said: "You deliberately "poured out oil near to our shore in such manner that the tide "would carry the oil on to our shore, as it did, and you are "therefore liable in nuisance or trespass unless you can excuse "yourselves," it is possible that the defendants could have been required to assume the onus of proof and to show that they became under necessity to jettison oil without any negligence on their part. The defendants might then have had to decide at what stage to take up matters of proof, and how exhaustively to anticipate all points that might be raised. But the litigation never developed at all in that way or on those lines. The plaintiffs set out their case and then sought to prove it. They called a series of witnesses.

The position was that if at 15.15, as matters then stood, the pumping out of oil was unjustifiable, the plaintiffs would succeed in their action. They fought that issue and failed in regard to it. But if it was as a result of negligence that the ship became in the predicament in which she found herself at 15.15, then, likewise, the plaintiffs would succeed. Accordingly, the plaintiffs quite naturally and properly alleged that that was the position. They set out to show that there had been negligence. They carefully specified and stated the negligence that they alleged. I see no reason to think that the course adopted by the plaintiffs was other than entirely appropriate and correct, and no criticism has been made, or is made, of their pleadings. Indeed, I think that it is virtually common ground in the proceedings that if there was negligence, then there would be liability in the defendants: negligence would be the foundation of a direct claim and would render unavailing any contention that the discharge of oil was an inevitable incident of navigation or was unavoidably necessary. With full appreciation of this the plaintiffs recited and tabulated the many and various respects in which they alleged that there had been negligence. In so doing they, so to speak, chose and fixed the agenda for the trial. Their suggestion was that there had been "negligent navigation, "management and control of the said oil tanker" by the second-named defendant.

Careful investigation followed in regard to all the points raised. The judge did not think that there had been negligence. I cannot think that the plaintiffs can fairly say in these circumstances that the defendants must fail because they have not shown that they were not negligent in some way not alleged. The case for the plaintiffs really is that the defendants did not disprove that the vessel was ill-found when she left Liverpool. But the plaintiffs did not allege that she was: they did not so allege either before the case began or during the case, save that at the trial they relied upon the authority of *The Merchant Prince*,[35] to which I will later refer, and claimed that the burden of proof shifted so as to require the defendants to explain what had happened and to prove inevitable accident. The defendants gave evidence that the ship had behaved normally from 7.30 a.m. until she was struck by heavy seas. Captain Davies, who was called for the plaintiffs, said that he thought that a captain would know when he left the Nelson buoy whether his ship was steering all right. I would have thought that a reasonable inference was that the later events and the damage that was subsequently found in the vessel were caused in some way as a result of the heavy seas. No one can say exactly when, where and how particular features of damage were sustained. There was the question of the broken stern frame. The judge negatived the suggestion that the fracture was caused by the direct action of the waves. But the vessel had a draught of 14 feet 10 inches aft, and at places in the channel there was not much water under her stern. Having regard to this fact and to the weather conditions, the suggestion of the Elder Brother that the stern frame may have been broken against the bed of the channel is highly significant.

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[35] [1892] P. 179.

Devlin J. pointed out that the possibility that there was some defect in the stern frame which made it liable to fracture could not be excluded. But the view, or theory, that was put forward by the plaintiffs was that the fracture was caused by the vessel striking the revetment wall owing to negligent steering at some point before that at which she grounded. The judge did not accept that view. I consider that his conclusion that the propeller fouled after the stern frame was fractured and that the fractured stern frame was the cause of the vessel getting out of control is a reasonable one. But no one can be sure. The fact that the cause of the fracturing of the stern frame cannot be precisely stated does not lead me to the view that there was anything wrong with the stern frame before the commencement of the voyage. I form the view that the vessel became damaged, with the results that followed, because of the sea and weather conditions that beset her, though the times and causes of under-water occurrences may never be known. The theory seems to me to be a very reasonable one that the fracture to the stern frame was just before 15.05 when the propeller first fouled. If the stern frame fractured at about that time, the vessel being positioned as she then was, and being subject to the severe conditions which prevailed, I do not think that there should be any inference or assumption that the occurrence came about through any lack of care either at the time or previously.

The first witness called by the plaintiffs was the harbour master of the Preston docks. He gave evidence that he saw the vessel on Monday, December 4, when she was high and dry on the sand. He noticed that the stern post of the rudder was fractured and that the rudder was twisted, and that there was damage to the propeller. If the plaintiffs had wanted to contend that any of these circumstances suggested that the ship was ill-found or was in a defective condition when she began her voyage, they could have done so and they could have asked for any documents or survey reports that they desired to see. The defendants could then have addressed themselves to such matters. The case that the plaintiffs presented was that the defendants were vicariously liable for the negligent navigation of the captain. It would have been another and quite different case if the plaintiffs had said

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that the defendants were themselves to blame in that they had sent their captain to sea in a faulty ship.

A further possibility might have been for them to submit that it was for the defendants to begin and to show that each and every conceivable avenue of criticism was a cul-de-sac. As it was, the plaintiffs called two witnesses with considerable experience of the navigation of large liners. Captain Davies thought that as there was something wrong with the steering it was a very hazardous operation to attempt to enter a narrow channel in the weather conditions prevailing. He thought that the two thuds heard at 15.05 must have been caused by the stern or the propeller striking the revetment wall. He had seen the survey reports of the damage, and agreed that if the stern frame came adrift the propeller could easily foul the stern frame. Both he and Captain Hartley, who was also called for the plaintiffs, gave evidence in support of the various allegations of negligence which were put forward.

On a consideration of their evidence and of all the evidence called by the defendants, Devlin J. rejected all the allegations of negligence. There were many of them; they included an allegation that the master had failed to make and keep himself acquainted by chart or otherwise with the presence and situation of the revetment wall. The plaintiffs did not assert that it was a defective or ill-found vessel that had sailed from Liverpool. Captain McMeakin had been master of the *Inverpool* for 26 years. Mackintosh had served as an engineer in her ever since she was built in 1925. They were both well qualified to know of her performances and to know the feel of her, and to know whether there was anything wrong with her. They would both have been well competent to answer any questions as to whether there were any defects in the condition of their vessel.

The Merchant Prince[36] was different from the present case. In broad daylight the *Merchant Prince* ran into a ship at anchor in the River Mersey. An action of damage by collision was brought. By the defence the collision was admitted, but it was pleaded that the cause was that the steering gear did not act and that it failed to act "in consequence of some latent defect or "obstruction which could not have been ascertained or prevented "by the exercise of any reasonable care or skill on the part of "the defendants or their servants, and the said collision and "damage were caused by inevitable accident." In *The*

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[36] [1892] P. 179.

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Marpesia,[37] inevitable accident was said to be "that which the "party charged with the damage could not possibly prevent by "the exercise of ordinary care, caution and maritime skill." On the pleadings in *The Merchant Prince*[38] it was held at the trial that it was for the defendants to begin and to prove what they had pleaded. It seems clear that where one ship is riding at anchor and another ship in motion collides with her the ship in motion is prima facie liable and can only escape from liability by showing inevitable accident: see *per* Fry L.J. in *The Schwan* and *The Albano*.[39] In *The Indus*[40] the law was stated as follows by Esher M.R.: "It is the duty of a vessel in motion to keep "clear of one at anchor, if the latter can be seen, and if she does "not keep clear, then she must show good cause for not doing so. "In what way, then, could the defendants justify themselves? "They could say that everything was done which could be done "by careful seamen, but that some overwhelming storm occurred "which prevented the ship from being navigated as she ought to "have been. They could say that an entirely unforeseen accident "which could not have been prevented by proper management, "occurred to the machinery with the same result. There are yet "other things which may be classed under the head of law known "as inevitable accident, which is a well-known expression, and "though it may not be philosophically correct, answers its pur- "pose. But the defendants must clearly prove the occurrence of "such an inevitable accident."

In *The Merchant Prince*[41] the President held that the defendants had proved inevitable accident, but this decision was reversed in the Court of Appeal. A new chain had been put in the steering, and new chains were known to be liable to stretch. There had been a stretching of the links of the chain on the night before the collision, and the chain had been tightened up. The defendants could have foreseen that if next morning the chain stretched while the ship was going down the Mersey the consequences would be awkward. They could easily have provided—by reasonable foresight—against this contingency. But it was for the defendants either to show what was the cause of the accident, and to show that the result of that cause was inevitable, or to show all the possible causes and to show with regard to each one that the result could not have been avoided.

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[37] (1872) L.R. 4 P.C. 212.

[38] [1892] P. 179.

[39] [1892] P. 419, 431; 8 T.L.R. 425, 426.

[40] (1886) 12 P.D. 46, 47; 3 T.L.R. 213.

[41] [1892] P. 179.

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It seems to be both good sense and good law that if a ship runs into another ship which is at anchor, or if one ship in a convoy runs into another ship, it is not enough for the colliding ship merely to say that its steering became defective. It is necessary to go on and explain how and why the steering became defective and to negative negligence. It might be the case (as in *The Dageid*[42]) that careless handling of the steering gear brought about defects.

I do not question the authority or the current validity of the decision in *The Merchant Prince.*[43] But in the circumstances of the present case, which differ materially from those in *The Merchant Prince,*[43] the proceedings were at the instance, and by the choice of the plaintiffs, launched and continued in quite a different way from those in *The Merchant Prince.*[43]

Though it is with diffidence that I differ from my Lords, I have reached the conclusion that the decision of Devlin J. was correct, and I would dismiss the appeal.

Appeal allowed as against the first defendants, and dismissed as against the second defendant.

Solicitors: *Sharpe, Pritchard & Co. for R. Edgar Perrins, Southport; Thomas Cooper & Co.*

P. B. D.

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[42] 80 Ll.L.R. 517.

[43] [1892] P. 179.

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Singleton, Denning and Morris L.JJ.

CAIRNS AND ANOTHER *v.* PIPER.

[Plaint No. J. P. 447.]

Landlord and Tenant—Rent restriction—Landlord by purchase—Purchase of premises subject to tenancy and subtenancy — Order for possession against tenant—Whether purchasers landlords vis-à-vis subtenant at date of purchase — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3) *—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sch. I (h) (as amended).*

In 1949 the defendant became the subtenant to R. of the first floor of a house of which R. was the tenant. In 1950, at which time R. was the statutory tenant and the defendant a statutory subtenant, the house was bought by the plaintiffs. In 1953 the plaintiffs obtained an order for possession against R. with the result that by the operation of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the defendant became the tenant of the first floor to the plaintiffs. The plaintiffs brought an action for possession against the defendant on the ground that they required the first floor of the house for their own occupation. The defendant claimed, inter alia, that the plaintiffs had become landlords by purchasing the house after September 1, 1939, and that by virtue of paragraph (*h*) of Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, they were not entitled to recover possession:—

Held, that the plaintiffs by purchasing the premises in 1950 did not become the landlords of the defendant's tenancy of the first floor: they became so only by the joint effect of the order for possession against R. in 1953 and the operation of section 15 (3) of the Act of 1920, and, therefore, subject to the question of greater hardship and reasonableness, the plaintiffs were not prevented by paragraph (*h*) from obtaining an order for possession.

APPEAL from Judge Drucquer, sitting at Clerkenwell County Court.

In 1949 the defendant, Sidney Piper, became the subtenant of the first floor of 134 Wightman Road, Harringay, N.4, to one Robinson, who was himself in occupation of the ground floor and was the tenant of the whole house. In 1950 the plaintiffs, Albert Thomas Cairns and his wife, Florence Cairns, bought the premises, by which time Robinson was a statutory tenant and the defendant a statutory subtenant to Robinson. On June 12, 1953, the plaintiffs brought an action for possession of the premises in the Wandsworth County Court against Robinson, alleging that alternative accommodation for him was available. The county court judge made an order for possession on the plaintiffs undertaking that they would grant a tenancy of the ground floor to Robinson, which, accordingly, they did, with the result that the defendant became the statutory tenant of the first floor to the plaintiffs in lieu of subtenant to Robinson by virtue of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.[1]

In the present action the plaintiffs claimed possession of the rooms on the first floor of which the defendant was their tenant, on the ground that they reasonably required the premises for occupation as a residence for themselves, under paragraph (*h*) of Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.[2]

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15: "(3) Where the interest of a "tenant of a dwelling-house to which "this Act applies is determined, "either as the result of an order or "judgment for possession or eject-"ment, or for any other reason, any "sub-tenant to whom the premises or "any part thereof have been lawfully "sublet shall, subject to the provi-"sions of this Act, be deemed to "become the tenant of the land-"lord on the same terms as he would "have held from the tenant if the "tenancy had continued."

By his defence, in addition to raising the question of greater hardship, the tenant took the point that the landlords could not succeed because they became landlords by purchasing the dwelling-house after the prescribed date (now September 1, 1939).

The county court judge held that as the defendant was a sitting tenant of the first floor at the time of the purchase by the plaintiffs in 1950, the plaintiffs could not obtain possession against him under paragraph (*h*) of the First Schedule, although at the time of the purchase the landlord of the defendant was Robinson and not the plaintiffs. In his opinion every sitting tenant and subtenant was protected against a purchaser who purchased after September 1, 1939. It seemed to him (the county court judge) contrary to the spirit of the Acts and of section 15 (3) of the Act of 1920, that the position of the subtenant could in any way be made worse by reason of the superior landlord obtaining possession by order of the court or otherwise. He accordingly dismissed the plaintiffs' claim for possession against the defendant.

The plaintiffs appealed.

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[2] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as amended, s. 3 (1): "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(*a*) the court has power to do so under the provisions set out in the First Schedule to this Act; or (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

First Schedule: "A court shall, for the purposes of section three of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*h*) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after the first day of September, 1939) for occupation as a residence for—(*i*) himself. . . . Provided that an order or judgment shall not be made or given on any ground specified in paragraph (*h*) of the foregoing provisions of this Schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

James Wellwood for the plaintiffs. The county court judge was wrong in holding that the plaintiffs became landlords by purchasing the dwelling-house after September 1, 1939. The provisions of paragraph (*h*) of the First Schedule to the Act of 1933 should be construed in the landlord's favour since the Act, being in derogation of the landlord's common law rights, must be strictly interpreted. (See *per* Scott L.J. in *Fowle* v. *Bell*.[3]) At common law a subtenant's interest is extinguished at the moment when the tenant's rights are forfeited by ejectment or otherwise, and, accordingly, the ambit of the protection given to the sitting tenant by paragraph (*h*) should be strictly construed and should extend only to that part of the dwelling-house actually occupied by the tenant. In the present case the judge of the Wandsworth County Court found that the ground-floor flat was the part of the dwelling-house actually occupied by the tenant. It is a governing principle of the Rent Restrictions Acts that the tenant should be given protection only in respect of the part of the dwelling-house actually occupied by him: see *Skinner* v. *Geary*.[4]

The provisions of paragraph (*h*) in relation to a purchasing landlord are an extra protection given to the sitting tenant, i.e., to a tenant who was residing in the house when the landlord became the owner. In such a case the landlord must provide alternative accommodation for the tenant before he can claim possession of the house. The question for the court in the present case, therefore, is: Where there is a tenant and a subtenant, must the landlord provide alternative accommodation both for the tenant and the subtenant when seeking possession of his house? It is submitted that the landlord must provide alternative accommodation only for the tenant and not for the subtenant, since the provisions of the First Schedule are concerned solely with the relationship between the landlord and the tenant, and make no provision for the case of the subtenant. In several of the provisions of the First Schedule, the landlord is given the right to claim possession but only as against the tenant and not as against the subtenant.

In fact, the position of the subtenant is duly safeguarded by the provisions of section 15 (3) of the Act of 1920, and these provisions only come into force when an order for possession is made against the tenant who is the landlord of the subtenant. It follows that the subtenant only comes into direct relationship with the owner, and becomes his direct tenant, when the tenancy of the tenant is determined. From that moment the owner of the dwelling-house becomes the landlord of the former subtenant, and the plaintiffs, therefore, became landlords of the defendant, not by purchasing the house in 1950 but by the operation of section 15 (3) of the Act of 1920, following upon the order for judgment for possession of the whole dwelling-house made in 1953.

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[3] [1947] K.B. 242; 63 T.L.R. 711; [1946] 1 All E.R. 668.

[4] [1931] 2 K.B. 546; 47 T.L.R. 597.

The words " become landlord by purchasing " in paragraph (*h*) have been strictly interpreted in all the previous cases which have come before the Court of Appeal as meaning " become landlord " by the act of purchase and only by the act of purchase ": see *Epps* v. *Rothnie*,[5] *Fowle* v. *Bell*,[6] *Newton* v. *Biggs*[7] and *Turney* v. *Hammond*.[8]

Finally, the subtenant had only the ordinary protection of the Rent Acts against his landlord, the tenant; it would be unjust if the subtenant were given a greater measure of protection against the new landlords, the plaintiffs. In fact, the present owners, the plaintiffs, by reason of the judgment for possession obtained by them in 1953, stepped into the shoes of the former landlord and became entitled to bring an action for possession in the same way as the former landlord could have done. [Reference was also made to *Littlechild* v. *Holt*[9] and *Parmee* v. *Mitchell*.[10]]

Conolly Gage for the defendant. The county court judge was right in holding that the plaintiffs were not entitled to recover possession from the defendant on the ground that they became landlords by purchasing the dwelling-house after September 1, 1939. At the time when the Wandsworth county court judge, in 1953, made an order giving the plaintiffs possession of the premises against Robinson, they were not thereby created the defendant's landlord since they had been his landlord from the time when they bought the premises in 1950. The expression " landlord " in paragraph (*h*) of the First Schedule to the Act of 1933 includes " head landlord," and the expression " tenant " in the Rent Acts includes " subtenant." *Dudley and District Benefit Building Society* v. *Emerson and Another*[11] supports the view that the word " landlord " is not necessarily a relative term. See, also, the definition of tenant given by Lord Goddard C.J. in *Littlechild* v. *Holt*.[12]

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[5] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.

[6] [1947] K.B. 242.

[7] [1953] 2 Q.B. 211; [1953] 2 W.L.R. 203; [1953] 1 All E.R. 99.

[8] [1952] 102 L.J.News. 721; 160 Estates Gazette 502.

[9] [1950] 1 K.B. 1; 65 T.L.R. 270; [1949] 1 All E.R. 933.

[10] [1950] 2 K.B. 199; 66 T.L.R. (Pt. 1) 1185; [1950] 1 All E.R. 872.

[11] [1949] Ch. 707; 65 T.L.R. 544; [1949] 2 All E.R. 252.

[12] [1950] 1 K.B. 1.

It is submitted that the intention of the legislature as expressed by paragraph (*h*) was to give special protection to all sitting tenants as against an owner who became landlord by purchasing the house, and the word "tenant" includes "subtenant." If the contention for the appellants is right, then no subtenants in possession at the time of a purchase of a house after the relevant date would be protected, and this would be contrary to the intention of the Act, which was to give protection to all sitting tenants and subtenants as against a landlord who became a landlord by purchase after the specified date.

James Wellwood in reply. The protection given to a subtenant by the Rent Restrictions Acts is contained in section 15 (3) of the Act of 1920, by the effect of which a subtenant becomes the direct tenant of the owner and has all the ordinary protection given to statutory tenants by the Rent Restrictions Acts. The landlords, therefore, will not be able to recover possession against the former subtenant, the defendant, unless they can satisfy the judge on the questions of reasonableness and greater hardship which remain to be determined.

SINGLETON L.J. This is an interesting case under the Rent Acts, and though we have had a number of authorities cited to us, there is no recorded decision covering the point.

In the year 1950 the plaintiffs bought 134, Wightman Road, Harringay, because they were threatened with eviction from the next-door house in which they are living. Since they bought No. 134 an order has been made against them under which they have to give up possession of the part of the house in which they are living, though the operation of the order is postponed for a period. When they bought No. 134 the tenant of the whole house was one Robinson, and he had sublet the upper part of the house to the defendant. In these proceedings the plaintiffs claim possession of the part occupied by the defendant.

The claim arises in this way: the plaintiffs having purchased the premises in 1950, thereafter took proceedings against Robinson, in which they offered him as alternative accommodation the downstairs flat which he was then and is still occupying. The plaintiffs obtained from Judge Done an order for possession against Robinson. Thereupon, it is said that the defendant became tenant to the plaintiffs and that he was their tenant when they commenced proceedings against him claiming possession of the upstairs flat which they required for their own occupation.

The guiding section for the purpose of this case is section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. By subsection (1) of that section it is provided: "No order "or judgment for the recovery of possession of any dwelling-house "to which the principal Acts apply or for the ejectment of a "tenant therefrom shall be made or given unless the court "considers it reasonable to make such an order or give such a "judgment, and either—(*a*) the court has power so to do under "the provisions set out in the First Schedule to this Act; or "(*b*) the court is satisfied that suitable alternative accommodation "is available for the tenant or will be available for him when the "order or judgment takes effect."

It follows from that subsection that if the court has power to make an order under the provisions of the First Schedule, there is no necessity to consider the question of alternative accommodation. In the proceedings against Robinson the plaintiffs did show suitable alternative accommodation, and they obtained the order on that basis. In the present proceedings before Judge Drucquer the submission made on behalf of the plaintiffs is that section 3 (1) (*a*) of the Act of 1933 applies, and that the court need only look at the schedule to the Act.

Section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides: "Where the interest of a "tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession "or ejectment, or for any other reason, any sub-tenant to whom "the premises or any part thereof have been lawfully sublet shall, "subject to the provisions of this Act, be deemed to become the "tenant of the landlord on the same terms as he would have held "from the tenant if the tenancy had continued."

When the plaintiffs obtained an order for possession against Robinson, the defendant Piper, who was Robinson's subtenant, became tenant of the plaintiffs on the same terms as those on which he would have held from the tenant if the tenancy had continued. Thus, by reason of section 15 (3) of the Act of 1920, when the order for possession was made by Judge Done, there came about the relationship of landlord and tenant between the plaintiffs and the defendant, but not, as I think, until then.

It is important to bear in mind that the present proceedings relate only to a part of the house and that the defendant was a subtenant to Robinson and was not in relationship of any kind with the plaintiffs until after the making of the order against Robinson.

The First Schedule to the Act of 1933, which is headed, "Possession or ejectment without proof of alternative accommodation," provides: "A court shall, for the purposes of "section 3 of this Act, have power to make or give an order or "judgment for the recovery of possession of any dwelling-house "to which the principal Acts apply or for the ejectment of a "tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if— "(*a*) any rent lawfully due from the tenant has not been paid, "or any other obligation of the tenancy (whether under the "contract of tenancy or under the principal Acts), so far as the "obligation is consistent with the provisions of the principal Acts, "has been broken or not performed." When that provision has to be considered in relation to a subtenancy it is obvious, I think, that one must consider the terms of the letting, and that the obligation which is referred to is one created by the agreement of subletting or arising therefrom. For that purpose, at the time of the making of the agreement of subtenancy, the tenant was the landlord of the subtenant.

Paragraph (*h*) of the First Schedule, which is the important paragraph for the purpose of this appeal, provides that an order for possession may be made if "the dwelling-house is reasonably "required by the landlord (not being a landlord who has become "landlord by purchasing the dwelling-house or any interest therein after the eleventh day of July, nineteen hundred and thirty-"one)" (now September 1, 1939) "for occupation as a residence "for—(i) himself; or (ii) any son or daughter of his over eighteen "years of age; or (iii) his father or mother: Provided that an "order or judgment shall not be made or given on any ground "specified in paragraph (*h*) of the foregoing provisions of this "Schedule if the court is satisfied that having regard to all the "circumstances of the case, including the question whether other "accommodation is available for the landlord or the tenant, "greater hardship would be caused by granting the order or "judgment than by refusing to grant it."

The result is that the court has power to make or give an order or judgment for the recovery of possession of any dwelling-house, or a part of the dwelling-house, where the court thinks it reasonable so to do if the dwelling-house is reasonably required by the landlord for his own occupation, with a proviso that an order or judgment shall not be made under paragraph (*h*) if the court is satisfied that greater hardship would be caused by granting the order than by refusing it. But the court has no power to make an order under paragraph (*h*) if a landlord has become landlord by purchasing the dwelling-house or any interest therein after September 1, 1939.

It is claimed on behalf of the defendant that the plaintiffs became landlords by purchasing the dwelling-house after September 1, 1939, and, therefore, do not fall within paragraph (*h*). It is true that they became "owners" after that date: it is equally true that paragraph (*h*) does not contain the word "owners" or "owner." Mr. Gage, on behalf of the defendant, submitted that, if the argument put forward by the plaintiffs is right, it would deprive subtenants of a great part of the protection which is given to them, and was intended to be given to them, by the Rent Restrictions Acts.

It is to be remembered that section 3 of the Act of 1933 provides that no order shall be made unless the court considers it reasonable to do so. At the commencement of the First Schedule to the Act there are the words "where the court considers it "reasonable so to do," and in paragraph (*h*) of the Schedule there is, first, the provision that the dwelling-house must be reasonably required by the landlord, and thereafter there is the proviso that an order for possession shall not be made if the court is satisfied that greater hardship will be caused by making such an order than by refusing to do so.

The question with which we are faced is whether or not the plaintiffs, having purchased the freehold in August, 1950, lose the benefit of the Schedule by reason of the fact that they purchased the house after September 1, 1939.

It appears to me that the words "landlord" and "tenant" in the Schedule are related the one to the other, and that they are used to cover the case of two people in contractual relationship. When the plaintiffs acquired the freehold of the whole of the premises in August, 1950, they did not become the landlords of the subtenant Piper; he remained the subtenant of Robinson. When on June 12, 1953, the plaintiffs obtained an order for possession of the whole house against Robinson upon their undertaking to grant him a new tenancy of the ground floor, there came into operation section 15 (3) of the Act of 1920, and the defendant became tenant of the plaintiffs on the same terms as those on which he had been tenant of Robinson. Thus, it appears to me, that upon the reading of the Schedule, the plaintiffs are not landlords who became landlords by purchasing the dwelling-house after September 1, 1939, but are persons who became landlords vis-à-vis the defendant (who was the subtenant) by virtue of the order made in the county court on June 12, 1953, coupled with the operation of law arising from section 15 (3) of the Act of 1920. In my view, therefore, the plaintiffs are entitled to claim in aid the provisions of the Schedule. The county court judge thought that they were not and gave judgment for the defendant. It was a difficult matter with which he was faced. I think, probably, most help is to be found in the words of Bucknill L.J. in *Fowle* v. *Bell*,[1] though there was really no decision of the court in that case to guide the judge in the case before us.

The appeal should be allowed and the case must go back for the consideration by the county court judge of the other points which arise under section 3 of the Act of 1933 and the First Schedule thereto.

DENNING L.J. In order to debar a landlord from the benefits of paragraph (*h*) of the First Schedule to the Act of 1933, it is not sufficient that he should have become the "owner" by purchasing the dwelling-house since September 1, 1939; he must have become the "landlord" by purchasing it since that date.

There are two dwelling-houses concerned in the present case. One of them is the dwelling-house comprised in the whole physical structure of the house, that is, ground floor plus first floor; the other is the dwelling-house comprised in the first floor. So far as the tenancy of the whole house is concerned, the plaintiffs became landlords by purchasing the house in 1950; and, in consequence, when they sought to obtain an order against the tenant of the whole house, Robinson, they had to provide suitable alternative accommodation. They offered him alternative accommodation in the shape of the ground floor where he was then living. Judge Done thought that, in all the circumstances, it was reasonable to make an order against Robinson, and he did so. He made an order as a result of which Robinson became tenant only of the ground floor, and Piper, who theretofore had been the subtenant of the first floor, became tenant of the first floor, holding directly from the plaintiffs.

In my judgment, the plaintiffs by their original purchase did not become landlords of the defendant's tenancy of the first floor. They only became landlords of that tenancy when Judge Done made his order, and they became landlords of it, not by the purchase but by the joint effect of the order and of section 15 (3) of the Act of 1920. They need not, therefore, provide alternative accommodation for the defendant. They have only to prove greater hardship, and, of course, they must satisfy the judge that it is reasonable to make an order. I agree with my Lord that the appeal should be allowed and the case remitted to the county court judge.

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[1] [1947] K.B. 242, 248; 62 T.L.R. 711; [1946] 1 All E.R. 668.

MORRIS L.J. I agree. When the plaintiffs purchased 134, Wightman Road, in 1950 they became the owners of the whole house; and they also became the landlords of Robinson, who became under obligation to pay to them the rent for the whole house. Robinson continued to be the landlord of the defendant, who paid rent to him in respect of the first floor. The plaintiffs, although they had become owners of the whole house, did not become the landlords of the defendant in respect of the first floor. When, in 1953, the plaintiffs obtained an order for possession against Robinson, he became their tenant in regard to the ground floor, and by the operation of section 15 (3) of the Act of 1920, the defendant then became their tenant in regard to the first floor.

In *Fowle* v. *Bell*,[2] Scott L.J. in his judgment, said in relation to paragraph (*h*) of the First Schedule to the Act of 1933: "The "phraseology seems to me necessarily to mean this, 'not being a "'a landlord who in relation to the tenant before the court has "'become that tenant's landlord by purchasing the dwelling-"'house.' . . ." after the given date.

It is true that the plaintiffs would not have become the landlords of the defendant had it not been for the fact that in 1950 they became the owners of the whole house. But the same would have been true if, when they became the owners of the house, the house had been empty, and, as in *Epps* v. *Rothnie*,[3] they had later granted a tenancy. But they did not become the landlords of the defendant in 1950; they became his landlords only in 1953; and they did not become his landlords by purchasing, or at the time of purchasing, but by obtaining an order for possession against Robinson and by the subsequent operation of section 15 (3) of the Act of 1920.

Appeal allowed with costs; case remitted to the county court judge for further consideration.

Solicitors: *Hamilton-Hill and Partners; Ranger Burton & Frost.*

P. B. D.

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[2] [1947] K.B. 242, 246.

[3] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.

HEALEY *v.* MINISTER OF HEALTH.

1954
May 31;
June 1, 2, 4.

Cassels J.

[1953 H. No. 2923.]

National Health Service—Superannuation—Determination by Minister —Whether subject to review—Plaintiff's claim to be a mental health officer within the meaning of the regulations—Prior determination by Minister that plaintiff not a mental officer—"Any question "arising under these regulations . . . shall be determined by the "Minister"—Whether jurisdiction of court to determine plaintiff's claim ousted by regulations—Powers of the court—Powers of the Minister—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 67 (1)*—National Health Service (Superannuation) Regulations,* 1950 (*S.I.* 1950, *No.* 497), *reg.* 60.

Minister—Determination by—Whether subject to review by courts.

By the National Health Service Act, 1946, s. 67 (1), "Regulations may provide (*a*) for the granting out of moneys provided by "Parliament of superannuation benefits to officers of such classes "as may be prescribed . . . (*i*) for the determination of all questions "arising under the regulations by the Minister." By regulation 60 of the National Health Service (Superannuation) Regulations, 1950, "Any question arising under these regulations as to the rights ". . . of an officer . . . or of a person claiming to be treated as such ". . . shall be determined by the Minister."

The Minister of Health determined, pursuant to regulation 60 of the National Health Service (Superannuation) Regulations, 1950, that the plaintiff, a shoemaker employed by a hospital management committee in the shoemaker's shop of a mental hospital, was not a mental health officer within the meaning of the regulations. The plaintiff brought an action against the Minister for a declaration that he was a mental health officer within the meaning of the regulations. The Minister raised a plea in bar to the plaintiff's claim that by virtue of section 67 (1) of the National Health Service Act, 1946, and regulation 60 of the regulations made under that section his determination was final and not subject to review or appeal in the courts. On the preliminary issue whether the court had jurisdiction to grant to the plaintiff the relief sought:—

Held, that on the plain words of the Act and the regulations the Minister was the person to whom Parliament had entrusted the determination of the question raised by the plaintiff as to his right to be treated as a mental health officer; that the Minister had determined the question and, in the absence of an allegation of bad faith or that the Minister had acted ultra vires, his determination, for which he was answerable to Parliament alone, could not be reviewed by the court; that, accordingly, the court had no jurisdiction to consider the question raised by the plaintiff's claim, which was in effect an appeal, notwithstanding that no appeal was provided for in the regulations, and, therefore, the Minister was entitled to judgment on the preliminary issue.

East Midlands Gas Board v. *Doncaster Corporation* [1953] 1 W.L.R. 54; [1953] 1 All E.R. 54, and *Gillingham Corporation* v. *Kent County Council* [1953] Ch. 37; [1952] 2 T.L.R. 1009; [1952] 2 All E.R. 1107 followed.

Barnard v. *National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113 considered.

PRELIMINARY POINT of law.

By a letter dated December 31, 1952, written on behalf of the Minister of Health to the plaintiff, a shoemaker employed by the Morgannwg Hospital Management Committee, the Minister determined, pursuant to regulation 60 of the National Health Service (Superannuation) Regulations, 1950,[1] that the plaintiff was not a mental health officer within the meaning of the regulations.

The plaintiff brought an action against the Minister of Health claiming a declaration that he was, and at all times had been, a mental health officer within the meaning of the regulations. By his statement of claim he alleged that the Minister had designated as mental health officers within the meaning of regulation 1 "all officers employed in hospitals used wholly or partly "for the treatment of mental patients . . . who devote the whole "or substantially the whole of their time to the treatment or care "of such patients," and that he devoted the whole or substantially the whole of his time to the treatment or care of mental patients at the Morgannwg Hospital, which was used wholly or partly for the treatment of mental patients, in that he, together with a charge hand, conducted the shoemaker's shop at the hospital, and during working hours mental patients employed in the shop were in his care, and at times, in his sole charge. He further alleged that shoemaking and repairing was occupational therapy and part of the treatment which the patients received.

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[1] National Health Service Act, 1946, s. 67: "(1) Regulations may "provide (*a*) for the granting out of "moneys provided by Parliament of "superannuation benefits to officers "of such classes as may be prescribed ". . . (*g*) for making special provi-"sion for special classes of per-"sons; (*i*) for the determination of all "questions arising under the regula-"tions by the Minister."

National Health Service (Superannuation) Regulations, 1950 (made under s. 67 (1) of the National Health Service Act, 1946), reg. 1: "(3) 'mental health officer' means "an officer on the medical or nursing "staff of a hospital used wholly or "partly for the treatment of mental "patients . . . who devotes the whole "or substantially the whole of his "time to the treatment or care of "such patients . . . and such other "classes or descriptions of officers "employed in such hospitals . . . as "the Minister may designate."

Reg. 60: "Any question arising "under these regulations as to the "rights or liabilities of an officer or "retired officer of an employing "authority, or of a person claiming "to be treated as such . . . shall be "determined by the Minister."

By his defence the Minister admitted that Morgannwg Hospital was used for the treatment of mental patients and that the plaintiff worked as a shoemaker in the shoemaker's shop, and had at times mental patients in his care, but denied that the plaintiff devoted the whole or substantially the whole of his time to the treatment or care of mental patients. He raised a plea in bar to the plaintiff's action contending that, as regulation 60 provided that any questions arising under the regulations as to rights or liabilities of any person claiming to be a mental health officer should be determined by the Minister, his determination by the letter of December 31, 1952, was final and not subject to review or appeal and that, therefore, the court had no jurisdiction to consider the plaintiff's claim, and the statement of claim disclosed no cause of action.

The master directed that the question of law raised by the Minister in his plea in bar should be tried as a preliminary issue.

J. P. Ashworth for the Minister. The courts have shown an unwillingness to have their jurisdiction ousted or curtailed unless that is the plain result of the words of a document, contract, Act or regulation—for example, in arbitration cases—but they recognize that Parliament, or the parties, can confer on some person or body exclusive jurisdiction. Where, therefore, Parliament commits a decision to a particular person or body without providing for appeal, the decision of that person or body is prima facie final. Here there is no provision for appeal, and the Act and regulations show a clear intention to oust the jurisdiction of the court and to commit to the Minister alone the determination of any question of the type specified arising under them. The question raised by the plaintiff is admittedly such a question; the Minister has determined it pursuant to regulation 60, and accordingly it is not open to the plaintiff to ask the court for a declaration in the converse sense, which is, in fact, an attempt to appeal from the Minister's decision.

The principle governing this type of case is clearly stated in *Crisp* v. *Bunbury*,[2] where it was held that the jurisdiction of the court was ousted by the word "shall" in connexion with reference to arbitration. In *Crisp* v. *Bunbury*[2] and *Gillingham Corporation* v. *Kent County Council*[3] there had been no previous determination of the question before the court, but in *East*

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[2] (1832) 8 Bing. 394.

[3] [1953] Ch. 37; [1952] 2 T.L.R. 1009; [1952] 2 All E.R. 1107.

Midlands Gas Board v. *Doncaster Corporation* [4] the Minister had decided a question entrusted to him by Parliament and it was sought to come to the court in fact by way of appeal from his decision; Hallett J. held that the court had no jurisdiction to consider the question. The present case, where the plaintiff is faced with and is seeking to escape from a decision which he does not like, is a clear case of appeal and cannot be distinguished from *East Midlands Gas Board* v. *Doncaster Corporation.*[5] *Gillingham Corporation* v. *Kent County Council* [6] and *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*[7] are also relied on.

Cases where want of jurisdiction is alleged must be distinguished. Certiorari will lie for want of jurisdiction, bias, misconduct or for an error of law appearing on the face of the decision: see *Rex* v. *Northumberland Compensation Appeal Tribunal.*[8] An analysis of the authorities shows that the only occasions in which the court has granted relief by declaration and injunction from the effect of a decision of an inferior tribunal were cases in which the plaintiff was aggrieved by the result and came to the court for personal relief, that is, relief against a decision affecting his livelihood—for example, in the medical council, club and domestic tribunal cases—and it was shown that the tribunal had exceeded its jurisdiction or had not acted in accordance with the requirements of justice. Where relief was granted in the form of a declaration and injunction it was because certiorari was not the appropriate remedy: see *Barnard* v. *National Dock Labour Board.*[9] [Reference was also made to *Cooper* v. *Wilson* [10]; *General Medical Council* v. *Spackman* [11]; *Leeson* v. *General Council of Medical Education and Registration,*[12] and *Lee* v. *Showmen's Guild of Great Britain.*[13]] In all the cases where the court did give such relief it was granted on the ground that the tribunal had acted without jurisdiction, for failure to comply with natural justice is to act without jurisdiction. *Barnard* v. *National Dock Labour Board* [14] is no authority for the proposition that merely because the decision of an inferior tribunal is alleged to be wrong the High Court will allow a plaintiff to appeal from it.

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[4] [1953] 1 W.L.R. 54; [1953] 1 All E.R. 54.

[5] [1953] 1 W.L.R. 54.

[6] [1953] Ch. 37.

[7] [1904] 2 Ch. 123.

[8] [1952] 1 K.B. 338.

[9] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113; [1952] W.N. 392; [1952] 2 T.L.R. 309; [1952] 2 All E.R. 424.

[10] [1937] 2 K.B. 309.

[11] [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337.

[12] (1889) 43 Ch.D. 366.

[13] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

[14] [1953] 2 Q.B. 18.

The question whether a tribunal has jurisdiction or not may depend upon the construction of rules, and if a tribunal misconstrues rules it exceeds its jurisdiction and the court will intervene: *Lee* v. *Showmen's Guild of Great Britain*[15]; but in the present case there is no suggestion of any misconstruction of rules leading to a usurpation of jurisdiction by the Minister. The court has also intervened when it was alleged that there was no evidence before a tribunal which would enable it to exercise the jurisdiction which it had purported to exercise: see *Allinson* v. *General Council of Medical Education and Registration*,[16] but even in such a case if the court is prepared to intervene, it is on the basis that the tribunal had no jurisdiction to act as it did and not on the basis that the tribunal was wrong in its decision.

There is no authority justifying the proposition that a mere allegation that a decision within the powers of a tribunal was incorrect enables the court to grant relief, or which detracts from the clear principles in *East Midlands Gas Board* v. *Doncaster Corporation*[17] and *Gillingham Corporation* v. *Kent County Council.*[18] The court has no jurisdiction to decide the question raised by the plaintiff, and his statement of claim discloses no cause of action.

P. M. O'Connor for the plaintiff. A citizen has a right to come to the Queen's courts and his right to be heard can only be taken away by statute by express words or by necessary implication.

Where no right to appeal from a determination of an inferior tribunal has been given, the court has jurisdiction, exercised by the prerogative writs or in an action for a declaration or an injunction, whichever remedy is best suited to the subject-matter in dispute, to inquire in proper cases into the manner in which the inferior tribunal has acted. Here the Minister is saying that the court has no power to inquire into something which is done under the regulations. The present issue depends upon the construction of a statute, and there is a strong tendency against construing a statute so as to oust the jurisdiction of the court—and a statute expressly limiting the rights of the citizen must be construed strictly: *In re Boaler*[19]; see also Maxwell on Interpretation of Statutes, 9th ed. (1946), p. 134. There is therefore a heavy onus on the Minister to show that Parliament has by express words so legislated as to deprive the court of jurisdiction.

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[15] [1952] 2 Q.B. 329.

[16] [1894] 1 Q.B. 750; 10 T.L.R. 304.

[17] [1953] 1 W.L.R. 54.

[18] [1953] Ch. 37.

[19] [1915] 1 K.B. 21; 30 T.L.R. 580.

Section 67 of the National Health Service Act, 1946, shows that the purpose for which the Minister may make the regulations is for the superannuation of officers; his powers are strictly limited to the terms of the section, and the words of subsection (1) (i) enabling the Minister to make regulations providing for the determination by him of all questions arising under the regulations are not sufficient to enable him to say that Parliament had given him exclusive jurisdiction. The wording of section 67 (1) should be contrasted with the clear and unambiguous language used when Parliament does give exclusive jurisdiction: see, for example, the words "No determination . . . shall be called in "question in any court of law," in section 5 (12) (which is concerned with conscientious objectors) of the National Service (Armed Forces) Act, 1939, and similar words in section 6 (9). See also section 43 (1) of the National Insurance Act, 1946, where the words "shall be final" are used, and sections 36 (1) and (3) and 37 of the National Insurance (Industrial Injuries) Act, 1946. Section 15 of the Asylum Officers' Superannuation Act, 1909, still in force when the National Health Service Act, 1946, was passed, provided that any dispute as to the right to, or the amount of, superannuation should be determined by the Secretary of State, "whose decision shall be final." Section 67 of the National Health Service Act contains no such provision, and in comparison its wording is weak. [Reference was also made to *England* v. *Visiting Committee of the Northampton County Mental Hospital.*[20]] The power which the statute gives to the Minister to determine questions is mere administrative machinery. In *Rex* v. *Abbot*[21] Lord Mansfield said[22] that "nothing but express "negative words shall take away the jurisdiction of this court"; and in *Goldsack* v. *Shore*[23] Evershed M.R. said[24] that "the "jurisdiction of the King's courts must not be taken to be "excluded unless there is quite clear language in the Act alleged "to have that effect."

If the jurisdiction of the court is ousted by the statute it must, in the absence of express words, be by necessary implication. It is submitted that in view of *Goldsack* v. *Shore*[23] doubt must be cast on earlier cases deciding that there can be an ouster of jurisdiction by implication. See on this point Maxwell on the Interpretation of Statutes, 10th ed., p. 131, note (*r*). If there can be such ouster, the authorities show that the court is chary in drawing an implication when it would have been easy for Parliament to have stated its intention in express words. The implication must not be one of mere convenience, and will only be drawn where the whole object of the statute points clearly to an exclusive jurisdiction in the tribunal set up. [Reference was also made to *Jacobs* v. *Brett.*[25]] Under the statute in the present case it is not necessary for the making or the operation of the regulations, nor for the matters with which they deal, that the jurisdiction of the court should be ousted, and there is no reason, other than that of administrative convenience, why, on the thin words used in section 67, the court should draw the implication that Parliament must have intended that the Minister should be the sole tribunal to the exclusion of the court. It cannot be said that because the word "shall" in regulation 60 is mandatory Parliament intended to give the Minister a free hand. The Minister cannot by regulation increase the power given to him by statute, and if section 67, under which the regulations are made, does not oust the court's jurisdiction, the regulations, although they may go to the question whether the court will interfere, cannot qualify the section.

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[20] June 5, 1935 (unreported).

[21] (1780) 2 Doug. 553n.

[22] Ibid. 555.

[23] [1950] 1 K.B. 708; 66 T.L.R. (Pt. 1) 636; [1950] 1 All E.R. 276.

[24] [1950] 1 K.B. 708, 712.

There is no right of appeal or machinery for adjustment or inquiry other than by the Minister, so if the court cannot inquire into his determination great injustice might be inflicted from which there would be no redress.

[CASSELS J. If the Minister used his powers punitively could there not be an inquiry?]

Not if the Minister's contention is correct. The Minister would be a judge in his own cause and could decide as he liked for any reason that he liked and his decision could not be investigated. *Barnard* v. *National Dock Labour Board*,[26] where until discovery it was impossible for the plaintiffs to find out what had occurred, is a good example of the protection given by a right of action and of the danger of a decision that cannot be investigated. That case is in the plaintiff's favour.

Gillingham Corporation v. *Kent County Council*[27] was a case of ouster of jurisdiction by implication; it is submitted that in view of the conflict of authorities *Gillingham Corporation* v. *Kent County Council*[27] should not be followed. In any event it can be distinguished, because the plaintiffs were there seeking to by-pass the Minister and asked the court to decide a question before it had been determined by the Minister. They were met by a plea in bar and a motion to refer the matter to the Minister for his decision. Danckwerts J., when speaking of the jurisdiction of the court being ousted, was referring only to the time before the Minister had determined. That case can be compared with the case where there is an arbitration agreement and an action is stayed so that the parties can go to arbitration. *Crisp* v. *Bunbury* [28] and *Joseph Crosfield & Sons Ld.* v. *Manchester Corporation* [29] were also in reality cases of arbitration. *East Midlands Gas Board* v. *Doncaster Corporation* [30] is more difficult to distinguish from the present case, but it is submitted that the authorities relied on in the judgment do not support the proposition laid down and that it should not be followed.

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[25] (1875) L.R. 20 Eq. 1.

[26] [1953] 2 Q.B. 18.

[27] [1953] Ch. 37.

J. P. Ashworth in reply. The present case is indistinguishable from *East Midlands Gas Board* v. *Doncaster Corporation.*[31] That case was rightly decided, " on abundant authority," [32] and should be followed. Hallett J. was not referred to *Barnard* v. *National Dock Labour Board*,[33] but that case falls within the proposition that the court will interfere where it appears that a lower court has exceeded its jurisdiction. *Goldsack* v. *Shore* [34] is an illustration of the case where the court will determine whether or not a tribunal had jurisdiction. Whether the Minister had jurisdiction or not is not the question here.

Only certain questions were referred to the Secretary of State under section 15 of the Asylum Officers' Superannuation Act, 1909. Section 67 (1) of the National Health Service Act, 1946, as well as giving the Minister power, by subsection (1) (*k*), to make regulations providing for the adaptation, modification or repeal of existing provisions, gave him the much wider power to make regulations to provide for the determination by the Minister of " all " questions arising under the regulations. The Minister, in making the regulations, had to provide for the determination of " all " questions, and consequently the whole of the Act of 1909 was repealed. " All " is the important word. The absence of the words " shall be final " in the Act of 1946 is immaterial; the only context in which there is any necessity for such words is where rights of appeal are given in certain cases. In section 67, where there is no provision for appeal, they would be meaningless.

The court's power to control tribunals as to the method in which they carry out their determinations is quite a different thing from power to examine the decision itself; the reasoning in *Rex* v. *Abbot*[35] does not apply to this case. The Minister does not employ the plaintiff; he supplies part of the superannuation funds; there is a strong administrative element in this matter, and the Minister is not judge in his own cause: *B. Johnson & Co. (Builders) Ld.* v. *Minister of Health.*[36] The Minister is answerable to Parliament for his fairness and not to the court.

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[28] 8 Bing. 394.
[29] [1904] 2 Ch. 123.
[30] [1953] 1 W.L.R. 54.
[31] Ibid.
[32] Ibid. 58.
[33] [1953] 2 Q.B. 18.
[34] [1950] 1 K.B. 708.

Cur. adv. vult.

June 4. CASSELS J. By a plea in bar, the defendant contends that this court has no jurisdiction to consider the question of granting to the plaintiff the relief which he seeks, and that the statement of claim discloses no cause of action.

The master has directed that this should be decided as a preliminary issue. If it is successful, it is fatal to the plaintiff's claim before that claim is heard. If it fails, the plaintiff will be entitled to proceed with his action at some future date. No evidence has been called. [His Lordship referred to the admitted facts, and continued:] The case raises, not for the first time, questions of considerable importance concerning the powers of a Minister under an Act of Parliament and a statutory instrument, the right of a citizen to seek redress in the High Court when he contends that a determination of a Minister affecting what he considers his rights is wrong, and the powers of the court to review a determination of a Minister made in pursuance of an Act of Parliament and regulations made thereunder.

The principle involved in the case is important. The amount of money involved is not of great consequence, for if the plaintiff is allowed to proceed with his case and succeeds in the action, I am told that it will not mean much more than that he will become entitled to his superannuation a few years earlier than otherwise.

By section 67 of the National Health Service Act, 1946, the defendant has power to make regulations with regard to the superannuation of officers, and among the matters with which these regulations may deal are "(*g*) for making special provision "for special classes of persons, . . . (*i*) for the determination of "all questions arising under the regulations by the Minister; "(*k*) for such provisions supplementary to and consequential on

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[35] 2 Doug. 553n.

[36] [1947] W.N. 251; [1947] 2 All E.R. 395.

"the matters aforesaid as appear to the Minister to be necessary, "including provisions for adapting, modifying or repealing any "Acts of Parliament, whether public general, local or private, "or any such local Act schemes as aforesaid so far as appears "to the Minister to be necessary in consequence of the "regulations."

In 1947 the Minister of Health made the National Health Service (Superannuation) Regulations [S.R. & O. 1947, No. 1755], in which "mental health officer" was defined as follows: "'mental health officer' means an officer on the medical or "nursing staff of a hospital used wholly or partly for the treatment of mental patients or an institution so used for the "treatment of defectives who devotes the whole or substantially the whole of his time to the treatment or care of such "patients or defectives, and such other classes or descriptions "of officers employed in such hospitals or institutions as aforesaid as the Minister may designate." Regulation 53 provided: "Any question arising under these regulations as to the rights "or liabilities of an officer of an employing authority or of a "person claiming to be treated as such shall be determined "by the Minister."

The National Health Service (Superannuation) Regulations, 1950 [S.I. 1950, No. 497] adopted, with an immaterial addition, the same definition of a mental health officer, and provided, by regulation 60 that: "Any question arising under these regulations "as to the rights or liabilities of an officer or retired officer of an "employing authority, or of a person claiming to be treated "as such, or of the widow, any dependant or the legal personal "representatives of an officer or retired officer shall be determined by the Minister." The additions made by regulation 60 do not affect the question here. It is the provision for the determination by the Minister of any question arising under the regulations about the rights or liabilities of an officer which has to be considered. [His Lordship referred to the pleadings and continued:] The defendant contends that the Act of 1946 and regulations made in 1950 thereunder oust the jurisdiction of the court. He has determined the question. He has determined that the plaintiff is not a mental health officer within the meaning of those regulations. Can that determination be reviewed by a court of law? It is to be noted that the statement of claim does not allege that the defendant had no jurisdiction to do what he did, or that he acted ultra vires, or that he misconstrued the Act and the regulations, or that he acted contrary to the principles of natural justice, or that he was biassed, or that there was error of law on the face of the decision. In effect, the plaintiff wants to contend in the action that the defendant determined wrongly, and he wants the court to declare accordingly, or it may be said that the plaintiff is appealing against the determination of the defendant, notwithstanding that no appeal is provided for either in the Act or in the regulations.

The defendant contends on this preliminary issue that he is the person under the Act and the regulations to whom Parliament has committed the determination of such a question as the plaintiff raises regarding his right to be treated as a mental health officer, and that that is prima facie conclusive, to which the plaintiff answers that all citizens have a right to come to the Queen's courts, and that that right cannot be taken away from them except by express words in a statute or under certain statutes by necessary implication, or by agreement to give the decision to somebody else, as in arbitration. The plaintiff contends that he has a right to be heard by action. Whether he wins or loses is another question. Yet here in effect he says that the Minister, acting as sole judge in his own court and cause, has made a determination which he, the Minister, wants to have regarded as unchallengeable in a court of law. If that is right, says the plaintiff, the gravest injustice might be committed, and the victim have no remedy.

How do the authorities stand? The defendant submits that there is no authority in favour of, and several cases against, the proposition that a declaration can be granted merely for the purpose of establishing that the decision of the tribunal below was wrong. The defendant relies upon four cases and submits that one of those cases is on all fours with this. That case was the *East Midlands Gas Board* v. *Doncaster Corporation.*[1] There the defendants' gas undertaking became vested in the plaintiffs, who claimed money which the defendants had received when conducting the gas undertaking after the vesting date. As the parties could not agree, the claim came to be determined by the Minister of Health, as required by section 37 (2) of the Gas Act, 1948, which provides: "Any claim under this section by the "appropriate Board against the local authority shall be made "before the expiration of a period of twelve months beginning "with the vesting date, and if so made and not settled by agree- "ment, shall be determined by the Minister of Health."

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[1] [1953] 1 W.L.R. 54; [1953] 1 All E.R. 54.

Hallett, J., in giving judgment for the plaintiff, the Gas Board, said [2]: "The second point taken by counsel for the gas board "is that, whether the claim was or was not a valid claim under "the provisions of section 37 (1) having regard to the facts of "this case, by section 37 (2) the validity of the claim is expressly "referred by the legislature to the Minister of Health for determination, and, accordingly, on well-known principles and in "the light of abundant authority, this court has no jurisdiction to "decide whether or not the claim is valid, because its validity "was considered by the Minister of Health who determined the "question adversely to the defendant corporation. I do not think "that the law is in any doubt: see *Crisp* v. *Bunbury*,[3] decided in "1832 and referred to with approval by Vaughan Williams L.J. "in *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*[4] "The decision in those cases can be summarized as follows. If "two persons agree that any dispute which may arise between "them in respect of any matters shall be referred to the determination of a third person, that agreement will not oust the "jurisdiction of the court, but, since the court attaches importance to the sanctity of contract, the court will, generally "speaking, in the exercise of its discretion and in aid of that "sanctity of contract, stay an action which is brought in contravention of or non-compliance with what has been agreed. "That is what happens in the usual case where there is what "is commonly called an arbitration clause and one party, notwithstanding the arbitration clause, seeks to resort to the courts. "On the other hand, where the legislature has thought it proper "to lay down that the determination of a certain question should "be made by some authority other than the courts, the courts "have no jurisdiction to override Parliament and no jurisdiction "to determine that which Parliament has said shall be determined by some other person or body. If the other person or "body, being in the nature of an inferior tribunal, proceeds to "exceed its authority or not to exercise it properly, then, in "certain appropriate cases, the Queen's Bench Division of the "High Court of Justice, acting through the Divisional Court, can "restrain the person or body so acting by processes which are "well known, but, apart from that authority which can be exercised over inferior tribunals, the court cannot proceed as an "appellate authority to review, and, if it thinks right, overrule,

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[2] [1953] 1 All E.R. 54, 57.

[3] (1832) 8 Bing. 394.

[4] [1904] 2 Ch. 123, 135.

" the determination of a person or body to whom Parliament has " entrusted the determination of the particular problem."

On behalf of the plaintiff in this case, Mr. O'Connor says that, whilst it is not possible to distinguish the judgment of Hallett J., he submits that it is not a correct decision, that it is too wide and is founded on two cases which were arbitration cases. These two cases happen to be two of the four on which the defendant relies. The first is *Crisp* v. *Bunbury*,[5] where the action was brought against the trustees of a savings bank. Statute 9 Geo. 4, c. 92, s. 45, provided that such a dispute should be referred to arbitration and the award " binding and conclusive on all parties, " and shall be final to all intents and purposes, without any " appeal." Tindal C.J. said[6]: " It is evident, therefore, that " the legislature contemplated the cheap, simple, speedy, and " equitable adjustment of all disputes by a reference in the " mode pointed out in the Act, instead of a more expensive, " dilatory, and uncertain remedy by action at law; and we think " we should defeat that very serviceable object,—serviceable alike " to the depositors and to the institution—unless we construe " the words used, as words which import an obligation to refer, " and which take away the right to sue in the superior courts." It is to be observed that Tindal C.J. lived before the spacious days of legal aid.

The second case is *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*[7] in the Court of Appeal. At the trial of that action a preliminary objection was taken by the defendants that section 88 of the Manchester Ship Canal Act, 1885, made provision by one of its subsections for such a dispute to be referred to arbitration, and that, therefore, the court had no jurisdiction. Byrne J. overruled the objection. In the Court of Appeal Vaughan Williams L.J. said[8]: " I will now proceed to deal with " the question whether the effect of subsection (22) of section 88 is " to oust the jurisdiction of the court in the fullest sense of the " word, that is to say, in the sense that jurisdiction cannot be " given to the court to determine a question the determination " of which has to be relegated by Act of Parliament, even by the " consent of the parties to the litigation in court. That a statute " may thus bar a plaintiff from maintaining an action in a court " of law and compel him to pursue the course laid down by the " statute cannot be doubted: see *Crisp* v. *Bunbury*,[9] a case in

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[5] 8 Bing. 394.
[6] Ibid. 401.
[7] [1904] 2 Ch. 123.
[8] Ibid. 134.
[9] 8 Bing. 394.

"which it is to be observed that, although there was a trial at "Nisi Prius and a verdict for the plaintiff, the objection to the "tribunal was allowed to prevail, without any plea to the jurisdiction, on a mere objection taken at Nisi Prius and reserved to "be disposed of by the Court in Banc. The same case shows "that it is not necessary that the jurisdiction of the court should "be barred by express words: it is sufficient if the jurisdiction is "barred by necessary implication." Later, Vaughan Williams L.J. said [10]: "Assuming then, as in my opinion we must, that "the jurisdiction of the court may be ousted by statutory provisions which have no express words to that effect, let us see "what are the modes by which jurisdiction may be ousted. "Sometimes the statute constitutes arbitration the only tribunal "in which disputes between certain parties can be determined, "and thus ousts the jurisdiction. Sometimes the jurisdiction is "ousted because the statute has plainly said that some matter "essential to be proved in a particular action shall only be "determined by arbitration."

The last of the defendant's four particular cases was *Gillingham Corporation* v. *Kent County Council*,[11] before Danckwerts J. That concerned a dispute whether a building owned by the plaintiffs and leased to the defendants for higher education had been transferred to the defendants under the Education Act, 1944, s. 6 (3). Section 96 (2) of that Act provides that such a question shall be determined by the Minister. Danckwerts J. said [12]: "If "the clear words of the section refer the dispute for the decision "of the Minister, then there is authority that the jurisdiction of "the court is ousted and is transferred to the tribunal provided for "by the statute. The authority for that is *Crisp* v. *Bunbury*,[13] "which was approved by the Court of Appeal in *Joseph Crosfield* "*& Sons Ld.* v. *Manchester Ship Canal Co.*[14] There is no doubt "that the principle has often been recognized, but it is argued "on behalf of the plaintiffs in this case that I ought to have "regard to the mind or purpose of the persons with which this "statutory provision is concerned, and that it cannot have been "intended to have given to the Minister power to decide a "question of the construction of section 6 (3), which must be a "matter of law. But if I am satisfied on the precise terms of this "subsection that that matter is referred to the Minister for "decision, it seems to me that I have no choice in the matter.

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[10] [1904] 2 Ch. 123, 138.

[11] [1953] Ch. 37; [1952] 2 T.L.R. 1009; [1952] 2 All E.R. 1107.

[12] [1953] Ch. 37, 42.

[13] 8 Bing. 394.

[14] [1904] 2 Ch. 123.

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" It is plain that the dispute concerns property, and whether that " property has been transferred or not to the defendant county " council by section 6 (3) of the Education Act, 1944. It seems " to me that the plaintiff council are a local education authority " for the purposes of former Acts and are, therefore, a ' former " ' authority ' for the purposes of the Act of 1944, even though it " may be that they were only a local education authority for " certain purposes under the former Acts. It seems to me, there" fore, that the words of the subsection are perfectly plain, and " that this is a matter which is not open to consideration by this " court, because it has been referred by section 96 (2) to the " decision of the Minister and to nobody else. Accordingly, this " motion succeeds, and I order that the service of the writ be " set aside."

If a statutory tribunal has exceeded its jurisdiction the court is not powerless to act. In March of last year, *Barnard* v. *National Dock Labour Board*[15] was before the Court of Appeal. All I need say about the facts there is that the board had delegated its quasi-judicial disciplinary function to a port manager, and was held to have had no power to do so, and therefore the original notices of suspension were a nullity and so were the decisions of the appeal tribunal, which were based upon them. In that respect the Court of Appeal reversed the judgment of McNair J.,[16] but affirmed his decision on the preliminary point and held that in proper cases where persons would otherwise be without a remedy for an injustice, the court has a discretionary power to intervene by way of declaration and injunction in the decisions of statutory tribunals.

In his judgment, Singleton L.J. said[17]: " The courts have, " however, power to grant a declaration or an injunction in certain " cases to prevent an injustice," and he referred to *Cooper* v. *Wilson*,[18] where the court granted relief to a police officer who had been dismissed by the watch committee after he had resigned, and it was held that the watch committee had acted without jurisdiction. He also referred[19] to *Andrews* v. *Mitchell*,[20] another case of the tribunal acting without jurisdiction.

Later in his judgment in the *Barnard* case Singleton L.J. said[21]: " In the present case, if the question is not one of

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[15] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

[16] [1952] W.N. 392; [1952] 2 T.L.R. 309; [1952] 2 All E.R. 424.

[17] [1953] 2 Q.B. 18, 35.

[18] [1937] 2 K.B. 309; 53 T.L.R. 623; [1937] 2 All E.R. 726.

[19] [1953] 2 Q.B. 18, 36.

[20] [1905] A.C. 78.

[21] [1953] 2 Q.B. 18, 38.

"jurisdiction, it is certainly closely akin to it. The local board "had no jurisdiction to delegate; the port manager had no "jurisdiction to adjudicate; each purported so to do; and in this "case, as in *Cooper* v. *Wilson*,[22] a writ of certiorari was of no "use. It could be of no use to the plaintiffs in this case. They "did not know of the illegality which gave rise to the preliminary "point until long after the time for the writ had run, and the "question which has been argued before us was not before the "appeal tribunal at all. In the circumstances, I am of opinion "that the court has power to grant to the plaintiffs a declaration "that their suspension was wrongful. I am more concerned "whether that relief should be granted. It is a matter for the "discretion of the court, and that discretion should be exercised "sparingly."

Denning L.J. said this[23]: "Finally, Mr. Paull said (and it "was his principal argument) that these courts have no right "to interfere with the decisions of statutory tribunals except by "the historical method of certiorari. He drew an alarming "picture of what might happen if once the court intervened by "way of declaration and injunction. It meant, he said, that "anyone who was dissatisfied with the decision of a tribunal "could start an action in the courts for a declaration that it was "bad, and thus, by a side-wind, one could get an appeal to the "courts in cases where Parliament intended that there should "be none. I think that there is much force in Mr. Paull's con-"tention; so much so that I am sure that in the vast majority of "cases the courts will not seek to interfere with the decisions "of statutory tribunals; but that there is power to do so, not only "by certiorari, but also by way of declaration, I do not doubt. I "know of no limit to the power of the court to grant a declaration "except such limit as it may in its discretion impose upon itself; "and the court should not, I think, tie its hands in this matter "of statutory tribunals. It is axiomatic that when a statutory "tribunal sits to administer justice, it must act in accordance "with the law. Parliament clearly so intended. If the tribunal "does not observe the law, what is to be done? The remedy by "certiorari is hedged round by limitations and may not be avail-"able. Why, then, should not the court intervene by declaration "and injunction? If it cannot so intervene, it would mean "that the tribunal could disregard the law, which is a thing no "one can do in this country. The authorities show clearly that

[22] [1937] 2 K.B. 309.

[23] [1953] 2 Q.B. 18, 41.

" the courts can intervene. A good instance of the remedy by " injunction is *Andrews* v. *Mitchell*,[24] when a statute enacted " that the decision of a particular tribunal should be ' binding and " ' conclusive on all parties without appeal, and shall not be " ' removable into any court of law or restrainable by injunc- " ' tion '; but nevertheless the House of Lords held that the " court could, in an action for an injunction, set aside a decision " which was not given in accordance with the rules. A good " instance of the remedy by declaration is *Cooper* v. *Wilson*,[25] " where a watch committee, erected under statute, had dismissed " a police serjeant when they had no power in law to do so, and " had also acted in a way contrary to natural justice. Greer " and Scott L.JJ. held that on both grounds the serjeant was " entitled to a declaration that the order of the watch committee " was invalid. Furthermore, in *Leeson* v. *General Council of* " *Medical Education and Registration*,[26] and in *Allinson* v. " *General Council of Medical Education and Registration*,[27] this " court assumed without question that the court has power to " intervene by declaration and injunction in the case of statutory " tribunals just as it has in domestic tribunals, and I do not " think that we should admit of any doubt upon it. We had " occasion to examine the power in respect of domestic tribunals " in *Lee* v. *Showmen's Guild of Great Britain*.[28] The power is " no less in respect of statutory tribunals. This is not, however, " the occasion to lay down the bounds of the jurisdiction. We " have to consider here two decisions: first, the decision to sus- " pend the men; second, the decision of the appeal tribunal. So " far as the decision to suspend is concerned, as I see it, we are " not asked to interfere with the decision of a statutory tribunal; " we are asked to interfere with the position of a usurper. The " port manager (if he will forgive my saying so) is a usurper, or, " at any rate, is in the position of a usurper. I do not mean this " unkindly, because I know that he acted in good faith on the " authority of the board; nevertheless, he has assumed a mantle " which was not his, but that of another. This is not a case of a " tribunal which has a lawful jurisdiction and exercises it; it is a " case of a man acting as a tribunal when he has no right to " do so."

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[24] [1905] A.C. 78, 79.

[25] [1937] 2 K.B. 309.

[26] (1889) 43 Ch.D. 366.

[27] [1894] 1 Q.B. 750; 10 T.L.R. 304.

[28] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

In the same case Romer L.J. said[29]: "On Mr. Paull's preliminary point, all I wish to say is this, that prima facie it is "the right of everyone in this country who is involved in a legal "dispute to have that dispute determined by Her Majesty's "courts. That right can be taken away; sometimes it can be "taken away by contract, subject to certain safeguards, and "it certainly may be taken away by statute; but except to the "extent to which it is taken away (and here we are only concerned with parliamentary intervention) then prima facie that "right remains."

What is the effect of *Barnard's* case[29] upon the present case? I look at the statement of claim. The defendant has determined pursuant to regulation 60 that the plaintiff is not a mental health officer. The plaintiff claims a declaration from this court that he is. It is not suggested that the defendant has exceeded his jurisdiction.

Another case which went to the Court of Appeal, in which the decision of Ormerod J. in favour of the plaintiff was affirmed, was *Lee* v. *Showmen's Guild of Great Britain*,[30] where the area committee of a trade union for travelling showmen fined the plaintiff, a member, for alleged unfair competition, and the plaintiff, failing to pay the fine, was expelled from the union and thus deprived of his right to earn his living as a showman. That, too, was a case in which the courts held that the defendants had exceeded their jurisdiction, and that they had acted ultra vires.

Some of the medical cases were referred to in the course of the argument and, indeed, have been mentioned in some of the cases from which I have cited passages; but I do not think that they carry this case any further.

The first point taken on behalf of the plaintiff is that a heavy onus rests upon the defendant to show that by express words Parliament has excluded the jurisdiction of the courts. Mr. O'Connor argues that the words of section 67 (1) (i) of the National Health Service Act, 1946, giving power to make regulations for the determination of all questions arising under the regulations by the Minister, are not sufficient to enable a Minister to say that Parliament has given him exclusive jurisdiction in the matter. He submits that when Parliament gives exclusive jurisdiction it says so in very plain language. He cites the following Acts: National Service (Armed Forces) Act, 1939, section 5 (which concerns conscientious objectors) subsection (12),

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[29] [1953] 2 Q.B. 18, 46.

[30] [1952] 2 Q.B. 329.

" No determination of a local tribunal or the appellate tribunal " made for the purposes of this Act shall be called in question " in any court of law "; also section 6 (which deals with postponement) subsection (9), " No determination of the Minister, of " a Military Service (Hardship) Committee, of the umpire " or of any deputy umpire made for the purposes of this section " shall be called in question in any court of law." As to this, the defendant replies that they concern special classes of persons and represent the " high-water-mark of exclusion."

Mr. O'Connor also cites two Acts in 1946. First, the National Insurance (Industrial Injuries) Act, s. 36 (1) and (3), and the National Insurance Act, s. 43 (1), where in both instances it is provided that the determination of questions and claims by certain persons " shall be final "; but provision was made for some appeals to the High Court under both Acts. This form of power to a Minister to determine is by no means new. It is to be found in the Roads Act, 1920, s. 10, and the London Traffic Act, 1924, s. 6 (5). In the Town Planning Act, 1925, s. 1 (3), and s. 7 (3) the decision of the Minister is expressed to be final and conclusive. Mr. O'Connor contends that unless there are such words as appear in section 5 (12) of the National Service (Armed Forces) Act, 1939, the defendant cannot succeed in ousting the jurisdiction of the courts. I am unable to go so far as that with the plaintiff. Mr. O'Connor further says that the defendant, to succeed, must be able to show that the jurisdiction of the courts is taken away by implication, and that implication can only be drawn where the whole object of the statute points plainly to exclusive jurisdiction in the tribunal set up; but Mr. O'Connor contends that that is not this case. He suggests that *Gillingham Corporation* v. *Kent County Council* [31] is a case of necessary implication, but should not be followed, and in what he describes as the thin wording of this particular regulation an implication cannot be drawn that Parliament intended that the defendant should be the sole tribunal to the exclusion of the court. With respect, I am unable to agree with Mr. O'Connor. He cites *Rex* v. *Abbot*,[32] reported in a note to *Rex* v. *Whitbread*,[33] where Lord Mansfield said [34] that nothing but " express negative words shall take away the " jurisdiction of this court." That was a case of certiorari, and if this case concerned jurisdiction, which it does not, or the way in which the tribunal carried out its work, which is not a ground for the claim for relief, certiorari would be one of the methods of approach to the court.

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[31] [1953] Ch. 37.

[32] 2 Doug. 553n.

[33] Ibid. 549.

[34] Ibid. 553, 555.

Mr. O'Connor also refers to *Goldsack* v. *Shore*,[35] a case under the Agricultural Holdings Act, 1948, where, in the Court of Appeal, it was held that only the court had jurisdiction to determine whether a transaction was an agreement. The county court judge had non-suited the plaintiff on the ground that section 2 (2) of the Act required disputes arising as to the operation of subsection (1) in relation to any agreement to be determined by arbitration under the Act; but the Court of Appeal, while accepting the submission that the jurisdiction of the King's Courts must not be taken to be excluded unless there is quite clear language in the Act alleged to have that effect, held that a court must have jurisdiction to decide aye or no whether a transaction is or is not excluded from the section. The case was referred back in order that the inquiry might be pursued.

Mr. O'Connor also refers to the Asylum Officers' Superannuation Act, 1909, which, by section 1, divided asylum officers into two classes, first and second, and by section 15 provided: "In the case of any dispute as to the right to superannuation "allowance of any officer or servant of an asylum, or as to the "amount of the superannuation allowance to which any such "officer or servant is entitled, such dispute shall be determined "by the Secretary of State, whose decision shall be final." This Act was repealed by the regulations of 1947. Section 67 (1) (*k*) of the National Health Service Act, 1946, gives power to make supplementary and consequential provisions appearing to the Minister to be necessary by reason of the regulations.

Mr. Ashworth contends that the words "shall be final" do not really add anything unless there are other provisions of the statute which give limited right of appeal. He says that the Act of 1946 gave the Minister power to make regulations for the determination of all questions arising under the regulations, and the important word is "all."

Mr. O'Connor, with some force, criticizes modern legislation where, as he says, there is frequently a regulation where the Minister is first a party to the dispute and is then the judge. On this point the observations of Lord Greene M.R. in *B. Johnson & Co. (Builders) Ld.* v. *Minister of Health*,[36] are of importance. That was a case on the confirmation by the Minister of Health of an order under the Housing Act, 1936. The Master of the Rolls said[37]: " What is described here as a lis—the raising " of the objections to the order, the consideration of the matters " so raised and the representations of the local authority and " the objectors—is merely a stage in the process of arriving at an " administrative decision. It is a stage which the courts have " always said requires a certain method of approach and method " of conduct, but it is not a lis inter partes, and for the simple " reason that the local authority and the objectors are not parties " to anything that resembles litigation. A moment's thought " will show that any such conception of the relationship must be " fallacious, because on the substantive matter, viz., whether " the order should be confirmed or not, there is a third party who " is not present, viz., the public, and it is the function of the " Minister to consider the rights and the interests of the public. " That by itself shows that it is completely wrong to treat the " controversy between objector and local authority as a controversy which covers the whole of the ground. It is in respect " of the public interest that the discretion that Parliament has " given to the Minister comes into operation. It may well be " that, on considering the objections, the Minister may find that " they are reasonable and that the facts alleged in them are true, " but, nevertheless, he may decide that he will overrule them. " His action in so deciding is a purely administrative action, based " on his conceptions as to what public policy demands. His views " on that matter he must, if necessary, defend in Parliament, but " he cannot be called on to defend them in the courts."

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[35] [1950] 1 K.B. 708; 66 T.L.R. (Pt. 1) 636; [1950] 1 All E.R. 276.

[36] [1947] W.N. 251; [1947] 2 All E.R. 395.

On the duty to act fairly, the Master of the Rolls said[38]: " The last phrase about which I might say a word—and I say it " particularly because I am disposed to think that Henn Collins " J. in this case really, if I may say so with respect, confused the " two meanings and applications of the phrase which I am about " to cite—is the phrase ' duty to act fairly.' As I have said, every " Minister of the Crown is under a duty, constitutionally, to the " King to perform his functions honestly and fairly and to the " best of his ability, but his failure to do so, speaking generally, " is not a matter with which the courts are concerned. As a " Minister, if he acts unfairly, his action may be challenged and " criticized in Parliament. It cannot be challenged and criticized " in the courts unless he has acted unfairly in another sense, viz., " in the sense of having, while performing quasi-judicial functions, " acted in a way which no person performing such functions, in

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[37] [1947] 2 All E.R. 395, 399.

[38] Ibid. 400.

"the opinion of the court, ought to act. On the assumption, for "instance, that the respondents are wrong in their contention, "and that there was no obligation to disclose these documents, "I can well understand some people might say: 'Well, unless "'there was some other objection, the Minister ought, in fairness, "'to have let these people know what he had got in his file on "'this particular topic.' If the Crown is right and the respondents are wrong, the statement that in fairness he ought to have "disclosed that information means nothing more than that, as a "Minister is expected to act fairly, he might have been expected "to do it. It would not mean that his failure to do it amounted to "a breach by him of any duty imposed on him by law which "could be discussed and enforced in the courts. On the other "hand, if the expression 'bound to act fairly' is used in strict "reference to his semi-judicial functions, it then bears a totally "different meaning. It then means, not that a Minister must "be expected under his general duty to act fairly, but that, if he "does not act fairly, he breaks a rule laid down by the courts for "the behaviour of a quasi-judicial officer. Therefore, it is important, in my opinion, if that phrase is used, to be quite sure in "which of those two senses it is being used."

It is pointed out that the plaintiff here is not in the employment of the defendant, the Minister of Health, who supplies the funds for the scheme of superannuation, and thus represents the public. I follow the decisions of Hallett and Danckwerts JJ. This is not a case in which I can exercise such discretion as I have in favour of the plaintiff. In the light of authority, and of what I regard as the plain words of the regulation, I hold that this plea in bar succeeds, and I must leave the defendant to apply for judgment; but, before parting with the case, I cannot help feeling that it is a matter of some concern that the question whether the plaintiff (and it may be large numbers of similarly situated employees) is within or without the superannuation scheme relating to mental health officers should not be decided by a court of law instead of, under the Act and regulations, by a Minister acting, doubtless, through one of his departments. Nobody knows what submissions, if any, were made. Nobody knows how, if at all, the case for or against the plaintiff was put. Something was decided against the plaintiff behind closed doors. It may be that it was a correct decision. It may be that it was a wrong decision. If it were possible to allow the plaintiff to proceed with his case, it would be argued in open court and, even if he failed, at least he would be able to say that he had had a hearing in public. I hope that he derives adequate satisfaction from the knowledge that for that departmental decision against him the Minister is answerable to Parliament. The defendant has determined pursuant to regulation 60 and no suggestion is made otherwise. The defendant therefore succeeds on this preliminary issue and the plaintiff fails.

Judgment for defendant.

Solicitors: *Foss, Bilborough, Plaskitt & Co.; Solicitor, Ministry of Health.*

J. F. L.

SOLOMONS v. R. GERTZENSTEIN LD. AND OTHERS.

[1951 S. No. 5061.]

C. A.

1954
May 20, 21,
24, 25, 26;
June 30.

Somervell,
Birkett and
Romer L.JJ.

Metropolis—Fire—Precautions—Means of escape in case of fire—Failure to maintain means of escape in efficient working order—Employee of tenant injured in escaping from fire—Breach of statutory duty under London Building Acts (Amendment) Act, 1939 — *Whether owners and receiver liable—Whether receiver " owner "—Fire caused by short circuit — Defence of accident — Statutory duty — Statute imposing penalty for breach—Statute for benefit of particular class of persons—Whether person injured by breach has right of action—Fires Prevention (Metropolis) Act,* 1774 (14 *Geo.* 3, *c.* 78), *s.* 86—*London Building Acts (Amendment) Act,* 1905 (5 *Edw.* 7, *c. ccix*), *s.* 12—*London Building Act,* 1930 (20 *&* 21 *Geo.* 5, *c. clviii*), *s.* 5 —*London Building Acts (Amendment) Act,* 1939 (2 *&* 3 *Geo.* 6, *c. xcvii*), *ss.* 33 (1), 35, 133 (2), 141 (3), 148.

Statutory duty—Whether civil right created—Penalty. " Owner."

A house in Soho was sublet to a number of tenants who carried on a variety of occupations, including manufacturing processes, on the premises, but control of the staircases and passages was retained by the landlords. The rents were collected and the property to a certain extent managed by a receiver who had been appointed in September, 1949, by a building society to whom the landlords had mortgaged their interest. In 1925 the London County Council had required the owners of the building to comply with section 12 of the London Building Act, 1905, which required that a trap-door with a fixed or hinged ladder, or other means of access to the roof be provided. In fact the building had a trap-door leading to the roof and an adequate ladder with hooks was provided, but it was seldom in position and was lying in a passage when, at about 7 p.m. on November 10, 1950, a fire started accidentally by a short circuit in the well of the staircase, which caused to smoulder a stack of packing paper and cardboard cartons placed on a half landing by the first defendants, tenants occupying rooms on the first floor where they carried on a fur manufacturing business. A sheet of flame suddenly flared up the staircase well and the plaintiff, an employee of a tenant of a second floor room, who had gone to the top floor in search of water, received injuries while escaping through a window. In an action for damages for personal injuries the plaintiff alleged, inter alia, a breach of statutory duty under section 133 of the London Building Acts (Amendment) Act, 1939, by the landlords, and also by the receiver as the "person in receipt "of the rack-rent as agent," in failing to keep and maintain the means of escape in efficient working order.

On the question as to the liability of the receiver:—

Held, (1) that the receiver was the "owner" (as an "agent") within section 33 (1) of the Act of 1939, but not an "owner" within section 5 of the London Building Act, 1930, in conjunction with which the Act of 1939 was to be read; and that, since section 33 (1) expressly applied only to Part V (sections 33 to 43) of the Act of 1939, and by section 141 (3) to that section, the receiver was not the "owner" within section 133 (2) and, therefore, was not responsible for any breach of the duties imposed by that subsection.

(2) That even if the receiver was the "owner" within section 133 (2), on the facts he was not in breach of the subsection.

Per Birkett and Romer L.JJ. (Somervell L.J. dissenting). As the duties imposed by the London Building Acts were imposed primarily for the protection of a particular ascertainable class, namely, the persons in a building, those persons would have a right to an action for damages for a breach of statutory duty notwithstanding that the statute also imposed penalties for such breaches.

Groves v. *Wimborne* (*Lord*) [1898] 2 Q.B. 402; 14 T.L.R. 493 applied.

Decision of Lord Goddard C.J. [1954] 1 Q.B. 565; [1954] 1 All E.R. 1008 reversed.

Appeal from Lord Goddard C.J.

The plaintiff was employed by his brother-in-law who was the tenant of a room on the second floor of an old house in Soho, where he carried on the business of a fur manufacturer. The house consisted of a basement, occupied by makers of musical instruments, a ground floor and three floors above. There were a number of tenants carrying on a variety of occupations, including manufacturing processes, in the building. It had a staircase, serving a series of half landings and landings, which was entirely separated from the back wall by a balustrade forming a fence between the landings and the back wall so that there was a well behind the staircase going up to the whole height of the house. The walls were panelled and on the first half landing, a few steps up from the hall, was an aperture in the wall, covered with a grid for ventilation behind which was an air shaft. Panelling was fitted round the grid and electric wires ran down the air shaft.

The space between the first half landing and the wall was covered with wire on which the first defendants, R. Gertzenstein Ld., fur manufacturers, who were tenants of rooms on the first floor, had stacked wrapping paper and corrugated packing material. The second defendants, H. and S. Development Co. Ld., were the landlords of the building, and had retained control of the staircase and passages. In 1949 they had mortgaged their interest to the Skipton Building Society who, in September, 1949, interest on the mortgage having fallen into arrear, appointed the third defendant, Joseph Edwards, receiver. Thenceforward the receiver, by a member of his staff, collected the rents and to a certain extent managed the property, visiting the premises from time to time and seeing that certain obligations under the landlords' covenant to keep the entrance and staircase clean and lighted were carried out.

On November 10, 1950, the plaintiff and his brother-in-law had stayed later than the other tenants. Shortly after 7 p.m. the plaintiff came out of the room on the second floor and found smoke ascending from the stack of paper which was on fire though not burning fiercely. He and his brother-in-law ran down with buckets of water and the plaintiff then went up to the lavatory on the top floor to fetch more water while his brother-in-law went to telephone to the fire brigade. A sheet of flame suddenly burst out, reaching the second and third floors. The plaintiff's brother-in-law received serious burns, while the plaintiff on the top floor, seeing that he could not descend the staircase, got out of a window opening on to the back of the house and tried to climb down a pipe. His arm caught in a junction of the pipe and he was suspended by his arm, breaking the bone, and he remained in that position for some time before he was finally rescued by the fire brigade.

About February, 1925, the house had been the subject of a notice served by the London County Council under section 12 of the London Building Acts (Amendment) Act, 1905, requiring the owners to comply with the section.[1] On the top floor there was

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[1] London Building Acts (Amendment) Act, 1905, s. 12: "Means of "access to roofs. (1) (A) Every . . . "existing building . . . and (B) Every "new building; shall . . . be pro-"vided . . . by the owner with either "(*a*) A dormer window or a door "opening . . . on to the roof with "proper access thereto; or (*b*) A trap-"door in a suitable position approved "by the district surveyor . . . and "also with a fixed or hinged step-"ladder leading to the roof; or (*c*) "Other proper means of access to the "roof; . . ."

London Building Act, 1930, s. 5: "In this Act save as is otherwise "expressly provided therein and un-"less the context otherwise requires "the following expressions have the a trap-door leading to the roof, but, although an adequate ladder with hooks was then provided and kept on the premises, it was seldom kept in position and at the time of the fire was said to have been lying in one of the passage-ways on the top floor leading to the lavatories.

The plaintiff claimed damages, alleging negligence against all three defendants and against H. & S. Development Co., the landlords of the building, and also against Edwards, the receiver, alleging a breach of statutory duty in failing, as owners of the premises within the meaning of section 133 (2) of the Act of 1939, to keep the ladder in its proper and customary place.

Lord Goddard C.J. found that there had been a breach of section 133; that the word "owner" in that section bore the same meaning as in section 33; that the receiver was liable, as the person receiving the rack-rent, to be deemed to be the owner; that the landlords were also liable; and that the plaintiff had a cause of action and was entitled to recover damages, notwithstanding that the Act of 1939 imposed penalties for a breach of the statute.

The receiver appealed.

"meanings hereby respectively "assigned to them (that is to say): "'Owner' includes every person in "possession or receipt either of the "whole or of any part of the rents or "profits of any land or tenement or "in the occupation of any land or "tenement otherwise than as a tenant "from year to year or for any less "term or as a tenant at will."

London Building Acts (Amendment) Act, 1939, s. 33: "Means of Escape "in Case of Fire—(1) In this Part of "this Act . . . 'owner' in relation to "any premises means the person for "the time being receiving the rack-"rent of the premises whether on his "own account or as agent or trustee "for any other person, or who would "so receive it if the premises were "let at a rackrent."

S. 133: "(1) All arrangements and "safeguards for lessening danger "from fire provided in pursuance of "the provisions of the London Build-"ing Acts . . . shall be kept and "maintained in good condition and "repair and in efficient working order "by the owner of the building. . . .

"(2) All means of escape in case of "fire . . . provided in pursuance of "the provisions of Part V of this Act "[sections 33 to 43] or otherwise shall "be kept and maintained in good con-"dition and repair and in efficient "working order by the owner of the "building and no person shall do or "permit or suffer to be done anything "to impair the efficiency of any such "means of escape. . . ."

S. 141 (1) (*a*) empowers the "owner" of a building to enter it for the purpose of discharging the obligations imposed by Part V of the Act and by section 133.

S. 141: "(3) In this section the "expression 'owner' in relation to "any requirement in virtue of any of "the provisions of Part V (Means of "Escape in Case of Fire) of this Act "has the same meaning as in that "Part of this Act."

S. 148: "(1) . . . the acts or omis-"sions specified . . . shall be an "offence against this Act . . . (xxx) "To contravene or fail to comply with "the provisions of section 133 . . . "[penalty] £20 [for each day] £5."

Marven Everett Q.C. and *Harry Lester* for the receiver. The Lord Chief Justice negatived negligence on the part of anybody, but he was constrained to hold that there was a breach of statutory duty on the part of the landlords and of the receiver. The fire, he found, was caused by a short circuit. The questions raised by the appeal are: (1) whether the receiver is an "owner," so as to be under any statutory duty in respect of the keeping and maintenance of means of escape in case of fire, under the London Building Acts (Amendment) Act, 1939; (2) if he is an owner, what is the statutory duty owed by him in the circumstances; (3) has there been a breach of that duty; and if so, (4) does the breach give rise to an action for damages at the suit of an individual, or is it a duty which is only to be enforced by penalties provided in the Act. For the purposes of Part V, which includes section 33, it is conceded that a receiver is deemed to be the owner of premises as a person receiving the rack-rent, but Part V is concerned only with the provision of means of escape, which the Lord Chief Justice has found were provided in accordance with a notice served on the landlords in 1925. Part XII of the Act, which includes section 133, deals with maintenance. The word "owner" in section 133, having regard to the wording of section 1, has to be read with the definition section of the 1930 Act, which is an inclusive definition. Section 133 speaks only of "owner," and it is submitted that it is intended to be given only a limited meaning, which excludes an agent. It is clear from section 141 of the Act of 1939 that the special definition of "owner" in section 33 is only intended to apply to Part V.

Even if the receiver is to be treated as owner, there is no evidence to justify a finding that he was in breach of section 133. In any event this Act does not contemplate any cause of action for damages. It depends on what is the scope and purpose of an Act whether, in addition to penalties, there is given an individual right to sue for damages for a breach of statutory duty. [*Cutler* v. *Wandsworth Stadium Ld.*[2]; *Phillips* v. *Britannia Hygienic Laundry Co. Ld.*[3]; *Pasmore* v. *Oswaldtwistle Urban District Council*[4]; *Reg.* v. *Minister of Housing and Local Government, Ex parte Corporation of London*[5] were referred to.]

Viscount Hailsham Q.C. and *John Perrett* for the plaintiff. The evidence shows that the receiver was doing more than carrying out his ordinary duties as a receiver. He was not only collecting the rents, but was to a certain extent managing the property. The definition of "owner" in section 33 of the London Building Acts (Amendment) Act, 1933, includes a receiver appointed by the parties to a mortgage deed, because he is "the "person for the time being receiving the rack-rent of the premises ". . . as agent or trustee for any other person." Where the word "owner" appears in section 133 of the same Act the definition of section 33 is to be read as applying to it. There was in fact, on the evidence, a breach of section 133 and the damage complained of flowed from it. The breach was committed by the receiver as "owner." Section 133 is intended to be for the protection of the inmates of the building, and an action for damages lies for a breach of it, the penalty provided by section 148 being a totally inadequate remedy. Where there is danger to personal safety, unless it is clearly indicated by the legislature that there shall be only one remedy there is a right to an action for damages. Broadly speaking, wherever it can be established that a statute imposes a duty primarily for the benefit of a particular class of persons, they have a remedy independently of the criminal sanction: see *Dawson & Co.* v. *Bingley Urban District Council.*[6] There is really no case where Parliament, having legislated for the protection of a body of individuals, has refused them a right of action. If *Groves* v. *Wimborne (Lord)*[7] was rightly decided it is an authority which decides this case. [Other cases referred to were *Read* v. *Croydon Corporation*[8]; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*[9]; *Clarke* v. *Brims*[10]; *Gorris* v. *Scott*[11]; *Black* v. *Fife Coal Co. Ld.*[12]; *Britannic Merthyr Coal Co. Ld.* v. *David*[13]; *Lavender* v. *Diamints Ld.*[14]; *Knapp* v. *Railway Executive*[15]; *London Passenger Transport Board* v. *Upson*,[16] and *Couch* v. *Steel.*[17]]

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[2] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[3] [1923] 2 K.B. 832; 39 T.L.R. 308.

[4] [1898] A.C. 387; 14 T.L.R. 368.

[5] [1954] 1 Q.B. 140; [1954] 1 All E.R. 88.

Cur. adv. vult

June 30. The following judgments were read.

Somervell L.J. This is an appeal from a decision of Lord Goddard C.J., who awarded the plaintiff damages in the following circumstances. The plaintiff was badly injured in trying to escape from No. 36, Gerrard Street, Soho, when a fire occurred on November 10, 1950. The plaintiff worked for his brother-in-law, who had a small manufacturing business on the second-floor of the building. The first defendants, R. Gertzenstein Ld., occupied part of the premises, but no liability was established as against them. The second defendants, H. & S. Development Co. Ld., were lessees of the premises under a 99-year lease, and also occupied some rooms in it. They had mortgaged the premises to a building society, who had appointed the third defendant, F. J. Edwards, as receiver. They were both held liable, but the appeal before us was that of the third defendant only.

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[6] [1911] 2 K.B. 149.

[7] [1898] 2 Q.B. 402; 14 T.L.R. 493.

[8] [1938] 4 All E.R. 631.

[9] (1877) 2 Ex.D. 441.

[10] [1947] K.B. 497; 63 T.L.R. 148; [1947] 1 All E.R. 242.

[11] (1874) L.R. 9 Ex. 125.

[12] [1912] A.C. 149.

[13] [1910] A.C. 74.

[14] [1949] 1 K.B. 585; 65 T.L.R. 163; [1949] 1 All E.R. 532.

[15] [1949] 2 All E.R. 508.

[16] [1949] A.C. 155; 65 T.L.R. 9; [1949] 1 All E.R. 60.

[17] (1854) 3 E. & B. 402.

The fire was caused, or probably caused, by a short circuit setting alight a stack of paper. The Lord Chief Justice negatived any negligence in respect either of the short circuit or of the stack of paper, holding that the fire was accidental. On this basis the claim that falls to be considered is of alleged breach of statutory duty under section 133 of the London Building Acts (Amendment) Act, 1939. That section is one of several sections in the Act dealing with the provision and maintenance of means of escape in case of fire. Although such, or similar provisions, have been admittedly on the statute book for over 50 years, this is the first occasion on which it has been suggested that a civil right to claim damages is conferred by them.

In February, 1925, a notice was served by the London County Council under section 12 of the London Building Acts (Amendment) Act, 1905. The relevant part of that section provided that a building such as this should be provided by the owner either with a trap door and a fixed or hinged step ladder leading to the roof or other proper means of access to the roof. A file was produced and an official, one Brend, from the London County Council, gave evidence. The file showed that the work had been completed to the satisfaction of the district surveyor. It is clear that there was never a trap-door with a fixed or hinged step ladder and the surveyor must therefore have been satisfied with other proper means of access. There was a trap-door and there was a ladder unfixed. It had hooks which could be fixed into holes so as to give access to the trap-door. On the date of the accident the ladder was in a passage behind a door leading to the ladies' lavatory; in other words, it was not visible to anyone who, finding himself caught by the fire on the top landing, might seek to escape by the trap-door. One question that has to be decided is whether this constituted a breach of statutory duty for which someone, and if so who, could have been prosecuted.

There is one point which can be shortly disposed of, and that is as to causation. If the fact that the ladder was in the passage constituted a breach, I think on the facts as found it clearly must be treated as the cause of the plaintiff's injuries. He sought to escape by a window, his arm got caught in the curve of a pipe, a bone was broken and he was suspended for some time.

We have to consider in this case the London Building Act, 1930, and the London Building Acts (Amendment) Act, 1939. The latter Act is by section 1 to be read and construed as one with the former. Part V (sections 33 to 43) deals with means of escape in case of fire. "Owner" is defined in section 33 (1) as follows: "'owner' in relation to any premises means the person "for the time being receiving the rackrent of the premises "whether on his own account or as agent or trustee for any other "person or who would so receive it if the premises were let at a "rackrent." Section 34 provides that new buildings of certain categories are to be provided with means of escape in accordance with plans approved by the council. By subsection (5), where an offence has been committed the court, in addition to a fine, may prohibit the occupation of the building until presumably means of escape as required are provided. Section 35 deals with old buildings and provides that the council may serve a notice if in their opinion proper and safe means of escape are not provided. In this case also, if the notice is not complied with, the court may prohibit the occupation of the building. Section 36 deals with projecting shops, and section 37 is the successor of section 12 of the Act of 1905 to which I have referred.

The maintenance of means of escape, etc., is not dealt with in Part V but in Part XII of the Act of 1939, which is headed "Miscellaneous." Subsection (1) of section 133 provides that all arrangements and safeguards for lessening danger from fire provided in pursuance of the provisions of the London Building Acts, or of any by-laws made in pursuance of those Acts, "shall "be kept and maintained in good condition and repair and in "efficient working order by the owner of the building and no "person shall do or permit or suffer to be done anything to "impair the efficiency of any such safeguards or arrangements." Subsection (2) contains similar provisions with regard to all means of escape and safeguards.

One of the questions which arise is whether the definition of "owner" in section 33, which is expressly limited to Part V, is to be read as applying to section 133. Section 141, which deals with the power of the owner and others to enter and execute work, is relevant on this argument. Subsection (3) of that section provides expressly that in that section the expression "owner," in relation to any requirement in virtue of any of the provisions of Part V, has the same meaning as in that Part of the Act.

It is now possible to formulate the various issues that were argued before us: (1) Is a receiver appointed by a mortgagee within section 109 of the Law of Property Act, 1925, an agent within the definition in section 33? (2) Does the definition in section 33 apply to the word "owner" where it appears in section 133? (3) If the receiver, the third defendant, was an owner within section 133, did the plaintiff establish that he had failed to keep and maintain in good condition and repair, and in efficient working order, arrangements and safeguards for lessening danger from fire or means of escape provided in pursuance of the provisions of the London Building Acts, or, alternatively, was he a person who did or permitted or suffered to be done anything to impair the efficiency of any such safeguards or arrangements? (4) Does a breach of section 133 give a right to the individual to bring a civil action for damages? I have posed this question as applicable to section 133 because that is the section relied on, but it is, I think, clear that one has in the first instance to consider whether such a right is conferred by Part V.

I have no doubt that a receiver appointed by a mortgagee is within the definition. He collects the rents as agent for the mortgagor. It was pointed out that he would have no power to incur expenditure on matters for which obligations are placed on "owners." The same would apply to other rent collectors. I ventured in *Reg.* v. *Minister of Housing and Local Government, Ex parte Corporation of London,*[1] to express a hope that this definition, which occurs in many Acts, would some day be reconsidered. I hope if this is done that the inclusion simpliciter of agents will be considered. One can understand the necessity, for administrative purposes, of bringing in the rent collector if, as was not infrequent in old days, the identity of the landlord was unknown. When it is known it seems illogical that the obligations and the penalties should descend on an agent.

On the question of its application to section 133, section 141 (3) is of great importance. Where there are ambiguities or obscurities I take, I hope, a broad view in construing statutes, but there is here no ambiguity, nor is it possible, I think, to imagine an omission per incuriam. As the Act of 1939 is to be read as one with the Act of 1930 and the latter includes a general interpretation section, this will apply throughout unless excluded or modified, as it is by section 33. The definition in section 5 of the Act of 1930 is as follows: "In this Act save as is otherwise expressly provided "therein and unless the context otherwise requires the following "expressions have the meanings hereby respectively assigned to "them (that is to say): 'Owner' includes every person in "possession or receipt either of the whole or of any part of the "rents or profits of any land or tenement or in the occupation of "any land or tenement otherwise than as a tenant from year to "year or for any less term or as a tenant at will." The definition in section 33 is expressly limited to Part V. One might have thought that it had not been extended to the similar subject-matter of section 133 per incuriam but for its express extension in section 141.

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[1] [1954] 1 Q.B. 140; [1954] 1 All E.R. 88.

It was then submitted that the receiver was within section 5. I think not. One is faced with a general and a special definition. The latter expressly includes an agent and the former does not. One could not possibly in a partly penal statute imply an agent into the former definition. If a statute is plain, ours not to reason why, but it may be that the wide obligations placed on "a person" in section 133 made it unnecessary to bring in agents through the definition.

On the question whether there was a breach, the difficulty arises from the doubt as to what the district surveyor required in 1925. In particular, did he require anything as to where the ladder should be kept? There was some evidence that if the ladder was in position it, to some extent, blocked the passage. It would seem sensible, if it was not practicable for it to be kept under or by the trap-door, for there to be a notice saying where it was to be found. But was the failure to do either of these things a criminal offence? Was there under the initial approval any condition as to the whereabouts of the ladder? The first suggestion is that it was a failure to keep "in good condition or in "efficient working order the safeguards or arrangements or means "of escape." That is the obligation placed on the owner. I cannot think that these words are apt to describe what happened here. In ordinary cases a landlord, who in accordance with the district surveyor's requirements had provided a separate ladder, could not, of course, control the movement of it by occupants. Their action would fall under the second part of the subsection. The hypothetical occupant could be a person who had impaired the efficiency of the arrangements. This presupposes, of course, that the arrangements involved the ladder not being kept in the passage. I am not too clear about that. If one assumes that, the question is: Did the receiver do or permit or suffer to be done anything to impair the efficiency of the safeguards or arrangements? If he had acted merely as a receiver there could be no such suggestion. He did more, he appointed his brother, who acted more or less as if he were managing the property. He gave evidence which was not, I think, accepted as to seeing the ladder in position. Assuming that the brother must be treated as acting for the third defendant as receiver, I think that his action or inaction falls short of an offence. There was no satisfactory evidence as to who put the ladder in the passage, but it was not, in my opinion, established that the third defendant was responsible within the subsection. I arrive at this conclusion with some hesitation, as the Lord Chief Justice saw the premises, but we are dealing with a penal statute and doubts must be resolved in favour of the "accused."

The final question is whether an offence under the statute confers a civil right of action for damages on a person who suffers, as did the plaintiff here, by the commission of the offence. On the view which I have formed on the earlier points it is not necessary to decide this, but as the judgment below dealt with it I think that this court should deal with it. There have been Acts which expressly confer a right of action for a penalty or damages on a person aggrieved by its breach. There have been Acts which impose a duty without any sanction. We are concerned with neither of them but with Acts which (1) contain provisions which protect members of the public or some members in certain circumstances, (2) contain their own sanction by penalties or otherwise for the enforcement of these provisions. The courts have held that under the common law a person aggrieved by a breach of certain of such Acts has a right to sue for damages, although the Act itself provides only for a criminal sanction. It is unnecessary to refer to the sections in the Act of 1939 prescribing the money penalties, as I do not think that their amount assists in deciding the question.

Attempts to lay down a principle have, as it seems to me, been unsuccessful. In *Couch* v. *Steel* [2] a sailor suffered in health

[2] (1854) 3 E. & B. 402.

from the absence on board of medicines as laid down by 7 & 8 Vict. c. 112, s. 18. The Act imposed a penalty which could be sued for by a common informer. If successful he retained part, and part went to the Seamen's Hospital Society. If there had been no penalty it was plain that the action would lie, the enactment being for the benefit of sailors. This principle was enunciated as long ago as 1704 (*Anon.*[3]) by Holt C.J.[3]: "It "would be a fine thing," said Holt C.J., "to make a law "by which one has a right but no remedy but in equity." The public wrong was (the court held) dealt with by the penalty, but there was a special and particular damage, as well as the public, sustained by the plaintiff. The plaintiff, therefore, could recover, and it was suggested that the plaintiff's position was, in effect, the same as if there had been no penalty, as the penalty was not claimable by him. This principle has not been followed.

Lord Tenterden in *Doe* d. *Rochester* (*Bishop*) v. *Bridges*,[4] in a passage approved by Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council*,[5] said: "where an Act creates an "obligation and enforces the performance in a specified manner, "we take it to be a general rule that performance cannot be "enforced in any other manner." This is a different approach to that suggested in *Couch* v. *Steel*.[2] Lord Tenterden's dictum was approved by Lord Simonds in *Cutler* v. *Wandsworth Stadium Ld.*[6] One may contrast with this the statement by Lord Kinnear in *Black* v. *Fife Coal Co. Ld.*[7]: "But when a duty of this kind is "imposed for the benefit of particular persons, there arises at "common law a correlative right in those persons who may be "injured by its contravention. Therefore I think it is quite "impossible to hold that the penalty clause detracts in any way "from the prima facie right of the persons for whose benefit the "statutory enactment has been passed to enforce the civil "liability."

In *Groves* v. *Wimborne* (*Lord*),[8] the case which decided that a workman could get damages for breach of a provision of the Factories Acts, it is suggested that, for there to be a right to damages, the Act must be in the interest of a particular class of persons (as in the statement I have already quoted from Lord

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[2] 3 E. & B. 402.

[3] (1704) 6 Mod.Rep. 27.

[4] (1831) 1 B. & Ad. 847, 859.

[5] [1898] A.C. 387, 394; 14 T.L.R. 368.

[6] [1949] A.C. 398, 407; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[7] [1912] A.C. 149, 165, 166; 28 T.L.R. 150.

[8] [1898] 2 Q.B. 402; 14 T.L.R. 493.

Kinnear) such as those working in a factory.[9] It is difficult to rely on this as a guide in the light of the decision in *Monk* v. *Warbey*.[10] In that case the owner of a car, in breach of the Road Traffic Act, 1930, had permitted his car to be used by a person uninsured against third-party risks. The uninsured driver damaged the plaintiff by negligent driving, and the plaintiff recovered against the owner notwithstanding that the offence carried a penalty. There would seem clearly here no particular class. Users of highways includes nearly everyone and it would be absurd to describe as a class those in the vicinity of an uninsured and negligent driver. On the other hand, in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*,[11] the defendants, in breach of their statutory duty, had failed to keep the water in fire plug pipes at or over the prescribed pressure. This was an obligation clearly imposed for the protection of a class, those whose property was within hose range of the pipe. The plaintiff was a member of the class and as a result of the failure to maintain the statutory pressure his premises were burnt down. This court, declining to follow the principle suggested in *Couch* v. *Steel*,[12] decided that he had no right of action.

If one passes from attempts to find a principle to what has been decided, the courts clearly lean in favour of conferring on workmen a right to claim damages for breaches of statutory duty imposed on their employers or the occupiers of factories in which they work. (*Groves* v. *Wimborne (Lord)*[13]; *Black* v. *Fife Coal Co. Ld.*[14]; *Britannic Merthyr Coal Co. Ld.* v. *David*.[15]) Purchasers from vendors on whom statutory obligations have been placed are less favoured. (*Phillips* v. *Britannia Hygienic Laundry Co. Ld.*[16]; *Biddle* v. *Truvox Engineering Co. Ld.*[17]) In the former case Atkin L.J. formulated the question in these words[18]: "Therefore the question is whether these regulations, "viewed in the circumstances in which they were made and to "which they relate, were intended to impose a duty which is a "public duty only or whether they were intended, in addition to "the public duty, to impose a duty enforceable by an individual "aggrieved." I think this is the only approach which the decisions justify. The regulations in question made it an offence to sell a car in such a condition as to be likely to cause danger on the road. An offence was committed but the buyer although injured had no right of action.

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[9] [1898] 2 Q.B. 402, 407.
[10] [1935] 1 K.B. 75; 51 T.L.R. 77.
[11] (1877) 2 Ex.D. 441.
[12] 3 E. & B. 402.
[13] [1898] 2 Q.B. 402.
[14] [1912] A.C. 149.
[15] [1910] A.C. 74; 26 T.L.R. 164.
[16] [1923] 2 K.B. 832; 39 T.L.R. 530.
[17] [1952] 1 K.B. 101; [1951] 2 T.L.R. 968; [1951] 2 All E.R. 835.
[18] [1923] 2 K.B. 832, 842.

I have already referred to *Atkinson's* case.[19] There was another case dealing with fire plugs. In *Dawson & Co.* v. *Bingley Urban District Council*[20] the defendants in breach of their statutory duty had failed to denote the situation of a fire plug. In fact there was a notice, but in the wrong place. As a result of the delay so caused damage by fire was done and the plaintiffs recovered. This might seem difficult to distinguish from *Atkinson's* case.[19] Kennedy L.J., having held that the act was a misfeasance and not a non-feasance, based his decision in part at any rate on the fact that the Act in question, the Public Health Act, 1875, contained no specific provision for the recovery of penalties for the misfeasance in question.

I hope that these citations are sufficient to establish that there is no rule of thumb formula and one must, as Atkin L.J. said, consider the Act. The provisions, like those in *Atkinson's* case,[19] are, of course, to prevent or lessen damage and injury by fire. I would myself have read Part V and similar provisions as intended to confer powers upon the council rather than rights on individuals. This view is, I think, supported by the definition. It is no doubt, as I have said, reasonable that a rent receiver other than the landlord should be treated as owner for operating the machinery of the Act. I find it impossible to imply an intention that rent receivers should be liable in damages. If one passes from agents to landlords who collect their own rents or owner-occupiers, one is still in a different area quoad this issue from, say, employers of labour or occupiers of factories. If one considers section 133 the liability would fall on " any person " who permitted or suffered to be done anything to impair the efficiency of the safeguards. This would be potentially a miscellaneous group which might include any resident in the premises. The character of the potential defendants supports my prima facie view. I think it is also supported by the fact to which I have already referred, that there is in certain cases in addition to penalties the further sanction of prohibiting the occupation of the building.

Reference was made to section 101 of the Factories Act, 1937, dealing with tenement factories, as a section under which an " owner " similarly defined would be held liable. The obligations of the Act in that case are primarily placed on the owner, not the occupier. I will assume that an owner would be held liable at common law, but apart from the difference in subject-matter there is an express provision not to be found in the Act which we are considering that quoad certain obligations the owner is not to be responsible for matters outside his control. I do not think that that section assists the plaintiff. I therefore am of opinion that the plaintiff would not have had a cause of action for damages assuming he had established a breach of section 133. I therefore would allow the appeal.

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[19] 2 Ex.D. 441.

[20] [1911] 2 K.B. 149; 27 T.L.R. 308.

BIRKETT L.J. stated the facts and continued: The plaintiff based his claim both upon negligence and breach of statutory duty, but Lord Goddard C.J., who visited the premises and examined the evidence with very great care, came to the conclusion that no negligence had been established, but that the plaintiff succeeded in his claim for damages for breach of statutory duty. The question is whether Edwards, the receiver, in the circumstances of this case is liable to the plaintiff.

The statutory duty alleged is contained in section 133 (2) of the London Building Acts (Amendment) Act, 1939. Subsection (2) provides: "All means of escape in case of fire and all safeguards "to prevent the spread of fire and any arrangements in connexion "therewith provided in pursuance of the provisions of Part V of "this Act or otherwise shall be kept and maintained in good "condition and repair and in efficient working order by the owner "of the building and no person shall do or permit or suffer to be "done anything to impair the efficiency of any such means of "escape safeguards or arrangements." Part V of the Act, there referred to, is headed "Means of Escape in Case of Fire," and deals in great detail with the duties in that regard laid upon the owner of the buildings. "Owner" is defined in section 33 as "the "person for the time being receiving the rackrent of the premises "whether on his own account or as agent or trustee for any other "person, or who would so receive it if the premises were let at "a rackrent"; and for the purposes of Part V there seems to be little doubt that the receiver was the "owner" of the premises for the purposes of Part V, and must therefore fulfil the duties and obligations laid upon him in Part V. But it must be remembered that he is not charged in this action with any failure of statutory duty under Part V. The failure of statutory duty alleged is in Part XII of the Act in failing to fulfil the duties imposed by section 133 (2).

Much therefore turns on this question: Does the definition of "owner" in section 33 of Part V apply to the "owner" in section 133 (2) of Part XII? It is true that section 133 begins with the words which are used for the heading of Part V, "All "Means of Escape in Case of Fire," and it is very natural to think that when the section goes on to impose on "the owner of the "building" the duty to maintain the means of escape in case of fire "in good condition and repair and in efficient working order" that the "owner" on whom the duty is laid to provide the means of escape in case of fire should be the same "owner" upon whom the duty is laid of maintaining the means of escape. But a consideration of section 141 of the Act shows that the "owner" for the purposes of Part V is not the same "owner" for the purposes of section 133 (2) in Part XII. Section 141 (1) (*a*), which gives power to the "owner" to enter the building for all the purposes of Part V, including, of course, the purpose of providing the means of escape in case of fire, also gives power to enter for the purpose of maintaining the means of escape as laid down in section 133. But by section 141 (3) it is provided: "In this section the expres- "sion 'owner' in relation to any requirement in virtue of any "of the provisions of Part V (Means of Escape in Case of Fire) "of this Act has the same meaning as in that Part of this Act." This would seem to indicate that "owner" in section 133 (2) was not intended to have the same meaning as in section 33, Part V of the Act, and the definition of "owner" for the purposes of section 133 must be found elsewhere.

Section 1 of the Act of 1939 directs that the Act is to be read as one with the London Building Acts, 1930–35, and section 5 of the Act of 1930 contains a definition of "owner" from which the words "or as agent or trustee for any other person" are omitted. In view of the wording of section 141 (3) of the Act of 1939 the definition of "owner" for the purposes of section 133 (2) is, I think, to be found in section 5 of the Act of 1930. If that is right, it has the effect of releasing the receiver from the statutory duty to maintain the means of escape from fire, and as that was the only duty of which he was alleged to be in breach the action must fail against him.

But in any event, obscure and unsatisfactory as the position of "owner" may possibly be thought to be, if one is to arrive at the meaning of "owner" for the purposes of section 133 (2) in the way I have described, I do not think that any breach of section 133 (2) was satisfactorily established against the receiver or at all. The Lord Chief Justice thought that the receiver was the "owner" within Part V and Part XII, as both sections were dealing with the same subject-matter, namely, means of escape in case of fire; and, as I have said, it was natural to think so if section 141 (3) is not kept in mind. In his judgment the Lord Chief Justice dealt at length with the circumstances in which the means of escape from fire were installed and, amongst other things, he said [21]: "It seems that about February, 1925, which "was long before either the second or third defendants had any- "thing to do with the premises, a notice had been served by the "London County Council under section 12 of the London Building "Acts (Amendment) Act, 1905, requiring the owners of the "premises to comply with the section to the satisfaction of the "district surveyor. The evidence on this point was given by an "officer of the London County Council who had a note of the "service of this notice, but no copy of it was produced. He said, "however, that this was what the notice would require: that "such work as was done was completed in April, 1925, and there "was nothing to show that the district surveyor had not been "satisfied. Under that section the county council could require "that there should be a trap-door in a suitable position con- "structed in accordance with the provisions of the section, with "a fixed or hinged step ladder leading to the roof or other proper "means of access to the roof. It was not suggested by either "side that there had ever been a fixed or hinged step ladder "provided, but that there had been a ladder with hooks on it "which could be fixed on to the trap-door. Having no other "evidence than that which I have set out, I must assume that "this was regarded by the district surveyor as an adequate means "of access to the trap-door, and that he was satisfied with the "latter. Another witness from the London County Council said "that he had surveyed the property about six months before the "fire and did so because the factory inspector had called the "attention of the council to the premises. He had apparently "prepared some survey drawings and he said in his evidence that "at the time of his survey there was no ladder giving access to "the trap-door." Then a little later [21]: "In fact, I find that "there was an adequate ladder with hooks provided and kept on "the premises, but the ladder was not always, and as I find, only "seldom kept in position." The means of escape was in fact a trap-door and ladder, and the breach of section 133 (2) found by the Lord Chief Justice was that the ladder was not kept in position to be readily available. It is true that the Lord Chief Justice found that "neither safeguards nor means of escape were

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[21] [1954] 1 Q.B. 565, 574.

"kept in good condition or efficient working order," but it would seem that what the Lord Chief Justice in fact found came more appropriately within the closing words of section 133: "No person "shall do or permit or suffer to be done anything to impair the "efficiency of any such means of escape, safeguards or arrange"ments." There was no evidence against the receiver on this matter. I do not think that it was proved that the means of escape which had been provided was not in good condition and repair and in efficient working order within the meaning of the section whatever might be said about the ladder not being in position at the time of the fire.

On the final point in the appeal I am of opinion that the Lord Chief Justice was right in holding that for a breach of the statutory duty imposed by the Act the plaintiff would have a right to sue for damages. Although it does not affect the result in the present case, I should like to state my view in a sentence or two, much as I regret differing from the judgment of my Lord on this point. It is said that this is the first case under the London Building Acts where it has been suggested that a civil action for damages will lie. In *Groves* v. *Wimborne* (*Lord*)[22] it was held that an action would lie against an employer in respect of personal injuries caused to a workman employed in a factory through a breach of the duty to maintain fencing for dangerous machinery imposed on the employer by section 5 (4) of the Factory and Workshops Act, 1875. A. L. Smith L.J. said[23]: "In the "present case it is admitted that machinery on the defendant's "premises which came within these provisions was not fenced "as required by the Act, and that injury was thereby occasioned "to the plaintiff, a boy employed on the works. On proof of a "breach of the statutory duty imposed on the defendant, and "injury resulting to the plaintiff therefrom, prima facie, the "plaintiff has a good cause of action. I leave out of the question "for a moment the provisions of sections 81, 82, and 86 of the "Act. Could it be doubted that, if section 5 stood alone, and no "fine were provided by the Act for contravention of its provisions, "a person injured by a breach of the absolute and unqualified duty "imposed by that section would have a cause of action in respect "of that breach? Clearly it could not be doubted. That being so, "unless it appears from the whole 'purview' of the Act, to use "the language of Lord Cairns in the case of *Atkinson* v. *Newcastle* "*and Gateshead Waterworks Co.*,[24] that it was the intention of

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[22] [1898] 2 Q.B. 402.

[23] Ibid. 407.

[24] 2 Ex.D. 441.

" the legislature that the only remedy for breach of the statutory " duty should be by proceeding for the fine imposed by section 82, " it follows that, upon proof of a breach of that duty by the " employer and injury thereby occasioned to the workman, a cause " of action is established." In considering the " purview " of the Act the Lord Justice continued: " In dealing with the question " whether this was the intention of the legislature, it is material, " as Kelly C.B. pointed out in giving judgment in the case of " *Gorris* v. *Scott*,[25] to consider for whose benefit the Act was " passed, whether it was passed in the interests of the public at " large or in those of a particular class of persons. The Act now " in question, as I have said, was clearly passed in favour of " workers employed in factories and workshops, and to compel " their employers to perform certain statutory duties for their protection and benefit." Vaughan Williams L.J. said in the same case[26]: " In each case one must look at the whole of the " statute, and gather from all its provisions the answer to the " question whether that was the intention." That is, that the remedy provided by the statute should be the only remedy.

It is said with truth that the provisions of the London Building Acts are designed to secure the safety of the City of London and all its inhabitants from the dangers of fire, and the detailed provisions of the Acts make this design very clear. But that purpose is achieved by laying upon individual owners the duties imposed by the Acts. Those duties are to provide means of escape in fire and to maintain such means of escape in efficient working order so that the persons in that particular building are protected. I agree with the Lord Chief Justice that the duty imposed in the present case was imposed for the benefit of a particular ascertainable class, namely, the persons in the building, and those persons have a right of action for a breach of statutory duty, notwithstanding that penalties are also provided for breaches. I would allow this appeal.

ROMER L.J. This case has throughout been argued on the footing that the third defendant, who was appointed by the mortgagees of 36, Gerrard Street, as receiver, was the person who was " receiving the rack-rent of the premises " within the meaning of section 33 of the London Building Acts (Amendment) Act, 1939. I accordingly propose to deal with the position on that footing although it might, I suppose, have been contended that all that the third defendant was receiving at the time of the fire were the rents of certain subtenancies which the mortgagors had granted, and that this is different from receiving the rack-rent of the premises as a whole. Upon the assumption, then, that the third defendant was in fact receiving the rack-rent of 36, Gerrard Street, I have no doubt but that he was the " owner " of the premises within section 33, notwithstanding his purely representative capacity. (See *Mayor of St. Helens* v. *Kirkham.*[27]) However, the definition of " owner " in section 33 only applies to Part V of the Act, and the section which imposes the statutory obligations which the third defendant is charged with failing to perform is section 133 (2), and that section is not within Part V of the Act, but within Part XII. The question, therefore, is as to the meaning of " the owner of the building " in section 133 (2) and in particular whether it includes a person who is receiving the rent of the premises as agent for and on behalf of a third person. Lord Goddard C.J. came to the conclusion that as Part V of the Act is dealing with the same subject-matter as section 133, that is, safeguards against fires, it would be sensible to assume that in each case the legislature had the same person in mind as " owner." I would respectfully adopt this assumption, which certainly accords with one's sense of the probable, were it not for section 141 and to which I am not sure that the Lord Chief Justice's attention was directed.*

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[25] (1874) L.R. 9 Ex. 125.

[26] [1898] 2 Q.B. 402, 417.

Subsection (1) (*a*) of section 141 empowers the " owner " of a building to enter it for the purpose of discharging the obligations imposed by Part V of the Act and by section 133, and if the section had ended there an inference might well arise that the power of entry was being conferred upon one and the same person and that that person was being treated as responsible for both sets of obligations. By subsection (3), however, it is provided that in section 141 the expression " owner " in relation to any requirement in virtue of any of the provisions of Part V of the Act has the same meaning as in that Part, that is, the meaning attributed to it by section 33. This provision shows almost beyond doubt, I think, that the expression " owner " in relation to any requirement in virtue of section 133 of the Act was to have a different meaning and that the draftsman was confirming, as it were, the initial qualification in section 33 that the definitions therein contained were applicable only to Part V. If, then, the " owner " under section 133 is excluded from the definition of that term in section 33 he has to be ascertained in some other way; and having regard to section 1 of the Act resort must be had, in my opinion, to the definition section in the London Building Act, 1930, s. 5. The expression " owner " is therein defined as including " every person in possession or receipt either of the " whole or of any part of the rents or profits of any land or " tenement or in the occupation of any land or tenement other- " wise than as a tenant from year to year or for any less term " or as a tenant at will."

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[27] (1885) 16 Q.B.D. 403.

* But see [1954] 1 Q.B. 565, 571.
Editor.

This language, if taken alone, might be wide enough to include an agent, for the expressions possession, receipt and occupation are not qualified by the word " beneficial." Nevertheless, it is clear to my mind that this definition, in its application to section 133 of the Act of 1939, does not comprehend a person who receives rent merely as an agent; for when there are two definitions of the same word applicable exclusively to different parts of an Act it would be against all canons of construction to introduce into one a characteristic which is only to be found in the other. Accordingly, the third defendant, as receiver, was not in my judgment the person upon whom, as the owner of 36, Gerrard Street, section 133 of the Act of 1939 imposed an obligation to keep the means of escape in case of fire in good condition and repair and in efficient working order.

Even if he had been, he was not, in my opinion, in breach of either of these statutory duties. I say this for two reasons. First, there was not at the time when the fire broke out anything wrong with the condition of the trap-door or ladder which constituted the means of escape from the building, and there was nothing in the evidence to show the contrary. Secondly, I cannot accept the argument that the trap-door and ladder were not " in " efficient working order." I think myself that this expression is applicable principally to fire escapes having mechanism of some kind, which, if faulty, might nullify the effectiveness of the apparatus. Assuming, however, that it could be applied to a trap-door and ladder, in the sense that they would not be in efficient working order if the trap-door became stuck and would not open or if a hook or rungs were missing from the ladder, nothing of that kind was suggested in the present case. The trap-door and ladder would have worked effectively enough if they had been joined together; the complaint is that the ladder was not, having regard to its weight, kept sufficiently adjacent to the trap-door and that its whereabouts was not made sufficiently obvious. This complaint, if justified (as I think on the whole it was) would not,

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in my opinion, support a charge of failing to keep the means of escape in efficient working order. It would, however, show that the efficiency of the means of escape had been impaired. A prohibition against the doing or permitting or suffering to be done any such impairment is imposed by section 133 upon everyone and the question, therefore, on this aspect of the case is whether the third defendant infringed this prohibition. As to this it was not proved that Edwards himself was at any material time upon the premises or had any knowledge of where the ladder was kept. He had, however, in pursuance of some authority which has never been clearly explained, purported to appoint his brother to " manage " the property, and the brother was constantly in and out of the premises in pursuance of the appointment. Whether his activities were known to or had the approval of either the mortgagors or the mortgagees I do not really know, and his position in the matter seems to have been somewhat obscure. Assuming, however, that he himself could have been held guilty of impairing the efficiency of the trap-door and ladder as a means of escape (as to which I express no opinion) I cannot think that vicarious guilt must also be imputed to the receiver. In my opinion nobody can be said for the purposes of section 133 to have done or permitted or suffered to be done something which he knew nothing whatever about and was under no duty to know anything about. In the result the plaintiff has failed, in my judgment, to establish a breach by Edwards of any of the statutory obligations imposed by section 133.

In these circumstances the question whether the plaintiff could sue for damages if he had established any such breach does not arise for decision. As, however, the point was so elaborately argued, and was decided by the Lord Chief Justice, I agree with my brethren that we should express an opinion upon it. It is, of course, clear that the general purpose of the London Buildings Acts was to promote the welfare and interests of the very considerable section of the English community which lives in London. With this end in view the Act of 1939 made legislative provision for such things as the naming and numbering of streets, the construction of buildings, dangerous and neglected structures and so on. There is nothing inconsistent, however, in including in legislation which is generally designed to regulate in various ways the lives of a vast community provision for the safety and protection of individuals; and in my opinion it was the object of section 133 of the Act of 1939 to make provision of this kind. Measures which are taken to prevent the outbreak and spread of fires in a great city are beneficial to the inhabitants of the city as a whole, for they tend to the protection of the lives and property of the general community. Measures that are taken to facilitate the escape of persons who happen to be in a house in which fire breaks out are also in a sense directed to the general welfare, for the death of a few in circumstances of tragedy is, or should be, felt by all.

Nevertheless, I cannot but think that the principal purpose of measures such as are found in section 33 is the protection of individuals rather than the promotion of the interests of the masses. It is a matter of general sorrow to hear of persons who have been trapped in a burning house without any means of escape; but it is death to the victims themselves. I emphasize this point because it appears to me to be of cardinal importance, in considering whether a civil suit lies for breach of a statutory duty, to see whether, on a broad view, that duty has been imposed for the general welfare on the one hand or in the interests of individuals or of a defined or definable class of the public on the other.

It is indeed difficult to reconcile all the decisions which have been reported on this subject, but this criterion does seem in many cases to have been accepted as a guide to Parliament's intention. In the following cases, inter alia, in all of which the statutory obligation under consideration was regarded as being primarily imposed for the benefit of a class, an action for damages for its breach was held to lie: *Couch* v. *Steel*[28]; *Britton* v. *Great Western Cotton Co.*[29]; *Groves* v. *Wimborne (Lord)*[30]; *Britannic Merthyr Coal Co. Ld.* v. *David*[31]; *Dawson & Co.* v. *Bingley U. D. C.*[32]; *Black* v. *Fife Coal Co. Ld.*[33]; *Read* v. *Croydon Corporation*[34]; and *Lavender* v. *Diamints Ld.*[35] Examples of cases in which the statutory duty in question was regarded as imposed for the benefit of the public at large and in which no action by an individual lay for its breach are: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*[36]; *Pasmore* v. *Oswaldtwistle Urban District Council*[37]; *Phillips* v. *Britannia Hygienic Laundry Co. Ld.*[38]; *Square* v. *Model Farm Dairies (Bournemouth) Ld.*[39];

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[28] 3 E. & B. 402.
[29] (1872) L.R. 7 Ex. 130.
[30] [1898] 2 Q.B. 402.
[31] [1910] A.C. 74.
[32] [1911] 2 K.B. 149.
[33] [1912] A.C. 149.
[34] [1938] 4 All E.R. 631.
[35] [1949] 1 K.B. 585.
[36] 2 Ex.D. 441.
[37] [1898] A.C. 387.
[38] [1923] 2 K.B. 832.
[39] [1939] 2 K.B. 365; 55 T.L.R. 384.

Badham v. *Lambs Ld.*[40]; *Clarke* v. *Brims*[41]; and *Cutler* v. *Wandsworth Stadium Ld.*[42]

In all of the above cases, in each of the two categories, considerations other than those as to the public or individual nature of the obligation were also weighed, for example, whether penalties were imposed for a breach; if so, whether the injured person was given or shared in the penalty; the nature of the obligation and, above all, the general purview and intendment of the Act. No universal rule can be formulated which will answer the question whether in any given case an individual can sue in respect of a breach of statutory duty. "The only rule," said Lord Simonds in *Cutler's* case,[43] "which in all circumstances is "valid is that the answer must depend on a consideration of the "whole Act and the circumstances, including the pre-existing "law, in which it was enacted." Even, however, if one looks to the whole of the Act of 1939, and to the circumstances which Lord Simonds mentioned, it is difficult, as I think, to hold that no action lies for a breach of section 133 (2) without disregarding an element which formed an important ground of decision in most of the cases in the first category to which I have referred and the materiality of which was recognized in the cases in both categories; and, in particular, without disregarding the decision and reasoning of this court in *Groves* v. *Wimborne* (*Lord*).[44] Indeed, this case seems in one sense stronger than *Groves* v. *Wimborne* (*Lord*),[44] for in that case the penalties imposed for infringement might be applied to the benefit of the person injured, but there is no similar provision in the Act of 1939.

If I am right in the view which I have already expressed that the main object of the subsection, or, as has sometimes been said, its pith and substance, was to provide for the safety of individuals as distinct from promoting the welfare of the general community, I find it difficult to appreciate why an "owner" of a house should be exempt from a liability to which an employer on whom similar or equivalent duties are imposed by the Factories Act is subject; for the inhabitants of a house are at least as definite a class as are the workers in a factory, and I am not sure what logical distinction there is in this regard between a man who employs labour in his factory and one who, for example, employs a staff in a restaurant, or in a block of service flats which he owns. It

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[40] [1946] K.B. 45; 61 T.L.R. 569; [1945] 2 All E.R. 295.

[41] [1947] K.B. 497; 63 T.L.R. 148; [1947] 1 All E.R. 242.

[42] [1949] A.C. 398.

[43] Ibid. 407.

[44] [1898] 2 Q.B. 402.

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is true that in the present case we are not concerned with an "owner" but with the generality of persons who are prohibited by section 133 (2) from impairing the efficiency of means of escape, but it is difficult to suppose that offenders under the first part of the subsection are liable to be sued (as I think myself that they are) whilst those under the later part of the subsection are immune. Moreover, I see no reason why a wrongdoer should not be answerable in damages even though his identity cannot be described or ascertained in advance.

I do not pretend to find this question other than difficult and it is with no feeling of assurance that I have arrived at a conclusion upon it which differs from that which commends itself to my Lord. I would only add that in supporting, as I certainly do, what he has said as to the desirability of reconsidering in future legislation the time-honoured, but troublesome, definition of "owner," I also share to the full the sentiments which Lord du Parcq expressed in *Cutler's* case [45] on the question of civil rights in relation to statutory obligations. With regard to the appeal as a whole I agree that it should be allowed.

Appeal allowed.

Solicitors: *Spiro & Steele; Herbert Baron & Co.*

A. W. G.

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[45] [1949] A.C. 398, 409.

LOCKWOOD *v.* LOWE.

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Mar. 17, 31.

Denning, Morris and Romer L.JJ.

Landlord and Tenant — Rent control — Shared accommodation — Dwelling-house let to two tenants, each occupying separate rooms, and sharing use of scullery and bathroom—One tenant vacating premises — Right of other tenant to remain in occupation — Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 8.

Landlord and Tenant—Shared accommodation—Effect of one tenant leaving—Implied term. Contract—Implied term.

A dwelling-house was let by the owner to two tenants, who were brothers-in-law, on the terms that they should by agreement separately occupy, with their families, one the upper half and the other the lower half of the premises, and should share the use of a scullery and a bathroom. When the occupier of the lower half

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moved out the defendant, who occupied the upper half, remained in possession of his part of the premises as tenant and also continued to use the scullery and bathroom. The landlord sought to evict him, but her claim for possession was dismissed by the county court judge. On appeal by the landlord:—

Held, per totam curiam, that the appeal should be dismissed.

Per Denning L.J. The terms on which both tenants held included the use in common of the shared rooms and therefore each came within section 8 of the Landlord and Tenant (Rent Control) Act, 1949. When one tenant left the contract of tenancy remained the same and the defendant was still protected. On the wording of the contract the landlord could not go in and share the premises with the defendant nor could she put anyone else in, unless she obtained an order of the court under section 8 (8), which gives the county court power to modify the terms of the contract. It is possible that the court might so modify the terms as to permit the landlord to go in and share the house, but I think that it would hesitate to do so when the result would be to deprive the defendant of the protection of section 8.[1]

Per Morris L.J. It is conceded that until one tenant left the defendant's tenancy could have been protected by section 8 of the Act of 1949. I cannot see that any change has taken place in the terms on which the defendant held.

Per Romer L.J. It was implicit in the contract that the defendant's right to share with the other tenant was to last only so long as the other remained, and section 8 (1) did not apply thereafter, but the tenant's right to the shared accommodation became an exclusive right.

APPEAL from Judge Clark Q.C., sitting at Ilford County Court.

In 1941 the plaintiff landlord, Mrs. Lockwood, let her house, 170, Pembroke Road, Ilford, to the defendant Lowe and his brother-in-law, Bartholomew, each tenant and his family occupying separate rooms but sharing the use of the scullery and bathroom. In June, 1950, Bartholomew vacated his part of the premises, but the defendant remained in occupation of the upper rooms with the use of the shared rooms, and the present action was brought by the plaintiff landlord for an order for possession of the whole house, in order that she might sell it with vacant possession. The county court judge held that the tenancy of the defendant was one for exclusive occupation of the upstairs rooms with the shared use of the scullery and bathroom, and he dismissed the action. The landlord appealed.

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 8: " (1) Where "—(*a*) a tenant has the exclusive "occupation of any accommodation "(in this section referred to as 'the "'separate accommodation'), (*b*) the "terms as between the tenant and "his landlord on which he holds "the separate accommodation include "the use of other accommodation (in "this section referred to as 'the "'shared accommodation') in com"mon with another person or other "persons, not being or including the "landlord . . . the separate accommo"dation shall be deemed to be a "dwelling-house to which those Acts "apply."

" (8) Without prejudice to the provi"sions of subsection (4) of this section, "the county court upon the applica"tion of the landlord may make such "order, either terminating the right of "the tenant to use the whole or any "part of the shared accommodation "other than living accommodation, "or modifying his right to use the "whole or any part of the shared "accommodation, whether by varying "the persons or increasing the num"ber of persons entitled to the use "of that accommodation, or other"wise, as to the court seems just:

"Provided that no order shall be "made under this subsection so as to "effect any termination or modifica"tion of rights of the tenant which, "apart from subsection (6) of this "section, could not be effected by or "under the terms of the contract of "tenancy."

Robin Dunn for the plaintiff.
The defendant appeared in person.

Cur. adv. vult.

March 8. The following judgments were read.

DENNING L.J. stated the facts and continued: Before Bartholomew left the house, it is clear that both he and the defendant were protected by the Rent Acts. The terms on which each of them held included the use of the scullery in common with the other. Each, therefore, came within section 8 of the Landlord and Tenant (Rent Control) Act, 1949. When Bartholomew went out the defendant, of course, no longer used the scullery in common with him: he used it alone. There was no one else to share it with. But does that mean that the defendant was no longer protected by the Acts? I think that he was still protected. His contract of tenancy remained unaltered. The "terms" on which he held remained the same. The only difference was that there was no occasion for him to share the scullery.

It was said that it was open to the landlord to go into the part of the house which Bartholomew had occupied and to share the kitchen with the defendant, and then to contend that the defendant was not protected save to the limited extent given by section 7 of the Act of 1949: in short, that he could be evicted. Then why, it was asked, should the landlord be put to the trouble of going into occupation to achieve this result? Why should she not get the advantages of section 7 at once? The answer to this argument is, I think, that the landlord was not at liberty to go into the house herself and share it with Lowe unless she first obtained an order of the court enabling her to do so. Lowe agreed to take this part of the house on the terms that he shared the kitchen with Bartholomew, and not with anyone else. On the wording of the contract, the landlord could not go in herself, nor could she put anyone else in to share it with Lowe.

But the Act has provided for some modification of the contract. Section 8 (8) gives the court power to modify the terms, so as to enable the landlord to put someone else into the house in place of Bartholomew, with the right to share the scullery just as Bartholomew had done. (Incidentally I may say in passing that I find it difficult to understand the proviso to that subsection, but I am inclined to think that its principal object is to see that, on any change of occupants, the hours during which the tenant can use the shared accommodation are not diminished or altered to his disadvantage. At any rate, the proviso should not be so construed as to nullify the operative part of the subsection.)

If the court can make an order under section 8 (8) to vary the persons in the house, as I think it can, it means that the landlord, by applying to the court, can put someone into the house to share with Lowe. The new tenant will presumably be someone other than the landlord. It is possible that the court might modify the terms so as to permit the landlord herself to go in and share the house, but it would hesitate to do so when the result would be to deprive Lowe of the protection of section 8. At any rate, the court has as yet made no such order, and until it does so the "terms" on which Lowe holds are that he shares the scullery with someone other than his landlord. He is therefore protected by section 8 of the Act of 1949. The appeal should be dismissed.

MORRIS L.J. (read by DENNING L.J.). The judge has held as a determination of fact that the tenancy was one for the exclusive occupation by Lowe of the upstairs rooms with the shared right of user with Bartholomew of the scullery and bathroom. It is conceded that until Bartholomew left in 1950 the defendant's tenancy could have been protected as a result of section 8 of the Landlord and Tenant (Rent Control) Act, 1949. No event has since taken place in reference to the house save that a notice to quit was served on Lowe in October, 1952. But I cannot see that any change has taken place in the "terms" on which Lowe held. There has been no new agreement or modification of the prior agreement, and save by mutual consent there could be no alteration of the provisions of Lowe's contract of tenancy, which form the terms and conditions of his statutory tenancy.

As, however, the agreement between Lowe and the landlord was marked by a singular economy of express provisions there is undoubtedly room for certain implied provisions. The contingency of the departure of Bartholomew, for any one of a variety of possible reasons, was not provided for. Terms are not lightly to be implied in a contract and certainly will not be implied merely because they might be considered by a court to be reasonable. Terms will only be implied which the court can say must have been of ready mutual acceptance by the parties. It is unnecessary on this appeal to decide what, if any, term can be implied for, in my view, it is at least clear that Lowe would not have agreed to a term which gave to the landlord a right, in the event of Bartholomew's departure, to enter the vacated part in such a way as to deprive Lowe of the security of tenure which otherwise he would enjoy. No term to that effect ought to be imported into the terms on which Lowe holds. In my judgment this appeal fails.

ROMER L.J. The issue which was argued in this case before the county court judge and before us was whether the defendant, who is tenant of a part of certain premises, of which the plaintiff is the landlord, is entitled to the protection afforded by section 8 (1) of the Act of 1949. I have come to the conclusion, on the whole, that he does not qualify for protection under that particular statutory provision, but that he can claim security of tenure, at all events for the present, for another reason.

So far as section 8 (1) is concerned the defendant would have to establish that at the date of the commencement of the proceedings: (a) he had the exclusive occupation of separate accommodation at the premises in question; and (b) that the terms as between himself and the plaintiff on which he held the separate accommodation included the use of other accommodation in the house in common with another person or other persons, not being, or including, the plaintiff.

No difficulty arises as to the separate accommodation, for the defendant had such accommodation from the time when he first went to live in the house in 1940, and he still had it on October 31, 1952, when these proceedings were started. The question arises with regard to the shared accommodation, and the first step towards answering it must be to ascertain what, in this regard, were the defendant's original terms of tenancy. The judge held "that what the plaintiff let to the defendant "was a part of the house to be agreed upon between the "defendant and Bartholomew together with a right to use "the scullery for cooking purposes in common with Bartholomew. "I accept the defendant's evidence that he occupied the upstairs "rooms, and I therefore hold that his tenancy was one for the "exclusive occupation of those rooms with the shared right of "user with Bartholomew of the scullery and bathroom." Bartholomew left the house in June, 1950, and has not since returned. What, then, was the position which arose upon his departure, and what was it at the date of the commencement of these proceedings?

The original arrangements between the plaintiff and the defendant and Bartholomew, as disclosed by the evidence, seem to have been of a loose and somewhat indefinite character, and I should imagine that no thought was given, and certainly no intention was proved, about what was to happen if and when either the defendant or Bartholomew, with their respective wives, were to leave the house for the purpose of living somewhere else. That contingency was left in nubibus. I cannot think, nor in my judgment did the judge intend to hold, that the common intention of landlord and tenant was that the defendant's right to share with Bartholomew was to continue during the lifetime of that man regardless of where he might have been living. The corollary of the defendant's right to share the scullery with Bartholomew was necessarily, as I think, that Bartholomew had a right to share it with the defendant; and if Bartholomew left the house, as he did, in order to live elsewhere, his right to use the scullery in common with the defendant would cease, if only for the reason that he would have no right to enter the house at all.

Accordingly, it is implicit in the contract as found by the judge that the defendant's right to share the scullery with Bartholomew was to last only for so long as Bartholomew was there himself. If it were possible to say that after Bartholomew's departure, or on October 31, 1952, or now, it was or is a term of the defendant's tenancy that he had or has a right to use the scullery in common with Bartholomew, it would be equally possible to say so, I suppose, in ten or twenty years' time (provided that the defendant is still living in the house), and even though by then Bartholomew may have gone to live in

America or may, indeed, be no longer alive. Accordingly, I come to the conclusion that whoever else (if anyone) may be regarded as " another person or other persons " for the purposes of section 8 (1) of the Act when these proceedings were started, Bartholomew is not one of them.

It is, however, clear, I think, that the defendant's contractual right to use the kitchen did not automatically cease altogether when Bartholomew left the premises. The contrary view would impute to the parties an intention so capricious and improbable that I should only accept it if there was clear evidence to support it, which there is not. Further, if in fact there was a term to that effect in the defendant's contract it would appear to be of no effect by reason of section 8 (6). It accordingly follows, in my opinion, that as at the date of these proceedings the defendant still possessed the right to use the scullery, such right was either an exclusive right or one which he shared with someone else; the only other possible person, I think, who could be said at the relevant date to have a right of user in common with the defendant was the landlord herself. There was no reason, that I can see, why the landlord should not have reoccupied Bartholomew's accommodation when Bartholomew went out. She did not, however, do so, nor has she done so since; and, in my opinion, the mere fact that the plaintiff had the ordinary rights of a landlord to take possession of vacant property which belongs to her does not justify the view that she should be regarded as being entitled to use the kitchen in common with the defendant.

Moreover, it certainly was not, nor has it ever been, a term of the defendant's tenancy of his separate accommodation that he should share the right of using the kitchen in common with the landlord. Such a term, as I have previously indicated, would involve the existence of a correlative right in the landlord as the other sharing party, and this right was not one to which the defendant ever agreed. It is not possible to suggest anyone other than Bartholomew or the plaintiff herself as a person with whom the defendant had the right to use the kitchen when these proceedings started, and as, in my opinion, neither of these persons can fairly be regarded as being such a person it must follow that no such person existed at all. The result would seem to be that on October 31, 1952, the defendant's right to use the kitchen was, in effect, and still is, an exclusive right.

If, however, the plaintiff were herself to reoccupy the separate accommodation in which the Bartholomews lived a

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different position would, or might, arise, about which I would prefer not to express any concluded opinion. It may be also that the county court judge could entertain an application by the plaintiff under section 8 (8) of the Act of 1949, but upon this also I do not desire to indicate any view, nor as to what the position would be if the court, upon any such application, made an order modifying the defendant's right to use the scullery in the manner authorized by the subsection. It is sufficient for the purposes of this appeal to say that in my opinion the defendant's separate accommodation, the bathroom and the scullery together constituted a dwelling-house to which the Rent Restriction Acts apply; that the plaintiff made out no case entitling her to possession of the premises so constituted; and that this appeal must accordingly be dismissed.

Appeal dismissed.

Solicitors: *Woodman, Matthews & Co.*

A. W. G.

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Apr. 12, 13;
May 3.
Lord Goddard C.J., Hallett and Pearson JJ.

REGINA *v.* TOMLIN.

Criminal Law—Embezzlement—Fraudulent conversion—Indictment—Count alleging embezzlement of money "on a day unknown" within a specified period—Whether allegation of general deficiency proper.

Although in the ordinary case where it is possible to trace individual items and to prove their conversion or embezzlement, it is improper to include all such items in a count charging a general deficiency, that is a rule of practice applicable to circumstances where it may be required to avoid injustice, and cannot be elevated into a rule of law applicable to all circumstances. If in a prosecution for conversion or embezzlement, where it is impossible to trace individual items of property or sums of money, the evidence for the prosecution makes it clear that there has been a conversion or embezzlement of either the whole or part of a general balance at one time, it is proper to charge the conversion or embezzlement of the general balance on a day between specified dates.

The manager of a shop rendered accounts to his employer weekly. Between stocktakings in March and September, 1953, there was found to be a deficiency of £420. The manager was indicted on a count (inter alia) of embezzling that sum on a day unknown between March 14, 1953, and September 26, 1953:—

Held, that that count was maintainable.

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

Reg. v. *Balls* (1871) L.R. 1 C.C.R. 328 followed; decision of Lynskey J. in *Reg.* v. *Lawson* (1952) 36 Cr.App.R. 30; [1952] 1 T.L.R. 889; [1952] 1 All E.R. 804 approved.

APPEAL against conviction.

The appellant, William John Tomlin, was tried on an indictment containing five counts. The first count of the indictment alleged that on a day unknown between March 14 and September 26, 1953, the appellant, being servant to Norman Gretton Jeffries Reynolds, fraudulently embezzled the sum of £420 15s. 3d. in money received by him for or on account of the said Reynolds, his employer. The second count alleged that on a day unknown between November 23, 1953, and December 28, 1953, he fraudulently embezzled the sum of £49 18s. 6d. in money received by him for or on account of his employer. There was a third count of embezzlement and the fourth and fifth counts charged the appellant with falsification of accounts, the fourth count being connected with the second count of embezzlement, and the fifth count being connected with the third count of embezzlement.

The appellant was employed by Reynolds, who owned several retail shoe shops, as the manager of a shop at Hastings. He rendered his accounts weekly. In March, 1953, Reynolds suspected a deficiency of stock and a stocktaking took place as the result of which certain records were kept. A further stocktaking took place in September, 1953, when it was found that between the two stocktakings goods to the value of £420 15s. 3d. had gone but no money had been paid over by the appellant to his employer in respect of the goods, or was available to be handed over to him. The appellant admitted the deficiency but denied dishonesty and subsequently made restitution. His only explanation of the deficiency was that the deliveries of goods during the material period between the two stocktakings might have been less than that represented by the invoices. The facts relating to the other four counts are not relevant to this report.

At the close of the evidence for the prosecution, counsel for the appellant submitted that there was no evidence to support the first two counts of embezzlement; that those two counts were charges in the nature of a general deficiency which could not be made in this case; and that the first count was not maintainable upon the facts of the case as the appellant was not under a duty to account from stocktaking to stocktaking but from week to week.

The recorder overruled the submissions. The jury, being dissatisfied with the evidence on the second and fourth counts, acquitted the appellant on those two counts. He was convicted upon the first, third and fifth counts. He appealed against his conviction on the first count of the indictment on the grounds (1) that the recorder had been wrong in law in leaving it to the jury, and that there was no evidence of embezzlement; (2) that the count was bad in law as alleging a general deficiency of moneys; and (3) that the recorder had misdirected the jury.

Neil Lawson for the appellant. To support a count of embezzlement there must be some evidence of the actual receipt of money at a particular time. In the present case there was no such evidence. The sum of £420 15s. 3d. which was the subject of the charge was not the money value of a number of missing items of property, but a deficiency made up partly of money and partly of stock, and therefore the recorder was wrong in leaving the question of embezzlement to the jury.

In the circumstances of the present case it would be contrary to law for the court to hold that a charge of embezzling a general deficiency of money could be sustained: see Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 646. In support of that submission reliance is also placed on *Rex* v. *Lloyd Jones*,[1] where it was held that it was not sufficient to prove a general deficiency of money. The earlier case of *Reg.* v. *Grove*,[2] which is in conflict with the view contended for, was decided on the special facts of the case and, moreover, the correctness of the decision was doubted by Bolland B. in the later case of *Reg.* v. *Jones*[3]: see Russell on Crime, 10th ed., vol. 2, p. 1297. The observations of Avory J. in *Rex* v. *Sheaf*[4] support the proposition laid down in *Rex* v. *Lloyd Jones*.[5] In *Rex* v. *Morris*[6] an appeal by an insurance agent from a conviction of fraudulently converting a sum of money received by him on account of an insurance company was allowed on the ground that he had been charged with the fraudulent conversion of a general balance, and that, said Lord Hewart C.J., "is a course which cannot properly be "taken."[7] In *Reg.* v. *Lawson*[8] Lynskey J. criticized the proposition in *Rex* v. *Morris*[9] as being too wide. He took the view that a charge of fraudulent conversion of a general balance could be justified if there were evidence to prove the actual receipt by the accused of part of a total sum on a particular day within the specified period. That case was decided at assizes and is not binding on the court. Moreover, the observations of Lynskey J. cannot apply to the present case: the defendant in *Reg.* v. *Lawson*,[10] a solicitor, was under no duty to account at any specified period: in the present case the appellant's duty was to account weekly.

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[1] (1838) 8 Car. & P. 288.
[2] (1835) 1 Mood. 447.
[3] (1837) 7 Car. & P. 834.
[4] (1925) 19 Cr.App.R. 46.
[5] 8 Car. & P. 288.
[6] (1933) 24 Cr.App.R. 105.
[7] Ibid. 107.
[8] (1952) 36 Cr.App.R. 30.
[9] 24 Cr.App.R. 105.

It is true that where a person is under a duty to account at a specified time he may be indicted for embezzling the aggregate of a number of small sums if he fails to hand over the money due on the specified accounting date. That was the basis of the decision in *Reg.* v. *Balls*,[11] where a member of a co-partnership was indicted for embezzling the co-partnership moneys. The facts of that case showed that the defendant was accountable weekly and that he embezzled a number of separate small sums over a six months' period, failing to hand over the weekly aggregates. He was charged with embezzling the weekly aggregates for three separate weeks, the maximum number of acts of embezzlement which could be charged in one indictment under section 71 of the Larceny Act, 1861, and it was held that the charges were properly made. The present case is distinguishable, because here the appellant was accountable weekly but was under no duty to account or pay over after the second stocktaking, and therefore the period specified in the count bore no relation to the specified accounting period.

It is submitted, therefore, that the decision in *Rex* v. *Lloyd Jones*[12] and subsequent authorities which state that a person cannot be charged with embezzling a general deficiency apply in the present case. Embezzlement is interference with possession, and that postulates the transfer of possession at some particular time, and therefore some specific date must be averred. Charges of general deficiency are difficult to disprove and are fraught with great danger, particularly in the case of a servant, who may, as in the present case, keep weekly accounts but have no access to more elaborate accounts kept by the employer. Thus the servant is at a disadvantage. To permit charges of general deficiency would open the door wide to employers to make criminal charges when the proper procedure is a civil action. In the present case it would be impossible for the appellant to plead autrefois convict if he were at some future date to be charged with the embezzlement of a specific sum. [Reference was also made to *Reg.* v. *Chapman*[13]; *Reg.* v. *Lambert*[14] and *Reg.* v. *Tucker.*[15]]

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[10] 36 Cr.App.R. 30.

[11] L.R. 1 C.C.R. 328.

[12] 8 Car. & P. 288.

W. G. Fordham for the respondent. The law is adequately summarized in *Reg.* v. *Lawson,*[16] which is on all fours with the present case, and Lynskey J.'s decision should be followed. In that case Lynskey J. distinguished the case of *Rex* v. *Morris,*[17] where a different view had been taken. In *Rex* v. *Morris*[17] it was possible for the prosecution to charge the embezzlement of specific sums. In *Reg.* v. *Lawson*[18] no such course was possible, and the position is the same in the present case. It is submitted that the prosecution is under no obligation to refrain from charging a general deficiency. Each case must be examined separately to see whether it is possible to make separate specific charges. If so, that course should be followed, but it is a matter of practice so to do. If it is ever right to charge the embezzlement of a general deficiency the present is a case where it would not only be right to do so but is the only course available to the prosecution. The facts show that at the relevant period the defendant was in sole charge of the shop. A careful account was taken by the employer at the beginning and end of the material period. It is submitted that the period specified in the charge was the proper accounting period. The fact that the appellant paid money into the bank weekly does not affect the position as the accounting date was manifestly the occasion when it was possible for the owner to take stock and ascertain the accuracy with which the accounts had been kept. No advantage can be gained by reviewing the authorities as the case is covered by *Reg.* v. *Balls.*[19]

Lawson replied.

Cur. adv. vult.

May 3. LORD GODDARD C.J. I will ask Pearson J. to read the judgment of the court in this case which has been prepared by Hallett J.

PEARSON J. The first ground of appeal is that there was no evidence of embezzlement to go to the jury on the first count, and the third ground of appeal alleges misdirection by the recorder in three respects. We have considered these grounds and only think it necessary to say that we find no substance in them.

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[13] (1843) 1 C. & K. 119.

[14] (1847) 2 Cox C.C. 309.

[15] [1952] W.N. 537; [1952] 2 All E.R. 1074.

[16] 36 Cr.App.R. 30.

[17] 24 Cr.App.R. 105.

[18] 36 Cr.App.R. 30.

[19] L.R. 1 C.C.R. 328.

The second ground of appeal raises the point of law which the recorder overruled, but has certified as fit for the consideration of this court, namely, that the first count was bad in law as alleging a general deficiency of moneys, or, to use the recorder's language, "embezzlement of a lump sum or general "deficiency arising from misappropriation of small unidentifiable "sums over a number of months." The cases cited upon this point in the textbooks are, perhaps, not easily reconcilable, and, although the legal position has, as we think, been illuminated by the recent ruling of Lynskey J. in *Reg.* v. *Lawson*,[1] a judgment of this court thereon may be helpful.

[His Lordship stated the facts, and continued:] The recorder plainly directed the jury that they could find the appellant guilty on the first count only if they were satisfied that he had dishonestly embezzled the money which he received from customers for the shoes which had apparently left the shop, and that if they thought that he might have stolen the shoes, as distinct from stealing the proceeds of their sale, they must acquit him. The verdict of the jury thus involves that the appellant had dishonestly embezzled the whole or part of the total sum of £420 15s. 3d. which he had received for or on account of his employer, during the period between the two stocktakings, from customers who bought shoes which had gone during that period. It was clearly impossible for the prosecution to say that a particular pair of missing shoes had been sold on a particular day, or to a particular customer, or for a particular sum which had then been dishonestly placed in the appellant's own pocket. The question for this court is whether in such circumstances a count in the form of this first count is bad in point of law.

Where separate offences can be charged in separate counts the court regards as improper an "omnibus" count in an indictment charging an aggregate of offences over a long period (see, for instance, *Rex* v. *Robertson* [2]); but here no splitting up of the aggregate sum was possible. In *Rex* v. *Grove* [3] the prisoner admitted a deficit of about £900, but the prosecution could not prove from whom the money was received or in what amounts or at what time. None the less, the court, by a majority, upheld the conviction. It is suggested in Russell on Crime, 10th ed., p. 1279, that "in view of the opinion expressed by Bollond B.

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[1] 36 Cr.App.R. 30; [1952] 1 T.L.R. 889; [1952] 1 All E.R. 804.

[2] (1936) 25 Cr.App.R. 208.

[3] (1835) 1 Mood. 447.

"in the later case of *Jones*,[4] *Rex* v. *Grove*[5] would seem to be "of no authority"; but Mr. Lawson has been unable to point out, and we have been unable to find, any passage in the judgment of Bolland B. which supports this suggestion. The ruling of Alderson B. in *Rex* v. *Lloyd Jones*[6] is not binding upon us, and such reports of circuit cases do not disclose either the facts or the reason sufficiently to make them satisfactory authorities. The same observation applies to *Reg.* v. *Chapman.*[7] In *Reg.* v. *Lambert*[8] Erle J. took a contrary view, remarking[9]: "There would be constant failure of justice if I were to decide "otherwise, since it is impossible, in cases like the present, where "a number of different amounts of money have been received, to "specify which sum or sums, or the parts of which sum or sums, "have been embezzled." We feel that, if the technical rule alleged on behalf of the appellant in fact prevails, justice will, in truth, in many cases, be defeated.

In our judgment, however, *Reg.* v. *Balls*[10] is inconsistent with the supposed rule. This was the unanimous decision of a very strong court, consisting of Cockburn C.J., Willes, Mellor, and Montague Smith JJ., and Channell B., and it is to be observed that counsel for the prosecution was not even called upon. Under section 71 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), only three acts of embezzlement could be charged or proved under one indictment, and then only if committed within six months. Accordingly, there was strong ground in 1871 for contending that where a number of small sums were separately embezzled one could not add them all together and treat it as one embezzlement of the whole, yet in *Balls'* case[10] the first count charged the embezzlement on December 5 of the aggregate of ten different payments made by ten different persons during the preceding week, and similarly the second count related to the aggregate of ten payments, and the third count to the aggregate of eleven payments.

In the present case we feel no doubt that when the stock-taking took place in September and shoes to the value of £420 15s. 3d. were found, as the jury's verdict implies, to have been sold, the appellant was under a duty to account then for the proceeds of sale, if he had not done so before; and the fact that he may have been also under a duty to account week by

[4] (1837) 7 Car. & P. 834.
[5] 1 Mood. 447.
[6] (1838) 8 Car. & P. 288.
[7] (1843) 1 C. & K. 119.
[8] (1847) 2 Cox C.C. 309.
[9] Ibid. 310.
[10] L.R. 1 C.C.R. 328.

week for the proceeds received during each week, and might, as in *Reg.* v. *Balls*,[10] "have been indicted for embezzling any of "the separate small sums received by him," does not prevent him from being indicted for embezzling the aggregate of those sums.

The decision in *Balls'* case [10] is binding upon us, unless the facts are distinguishable, and we can see no valid distinction. On the contrary, evidence to establish the 31 separate payments was apparently available in that case, so that there was less necessity than here for the aggregation. In *Rex* v. *Sheaf* [11] the conviction for fraudulent conversion was quashed upon the ground that the vital question of entrustment had never been left to the jury, but the question of charging the embezzlement of a general deficiency was mentioned by Avory J.[12] We find nothing in this passage inconsistent with the decision in *Balls'* case [13] or with our view that we should here follow *Balls'* case.[13]

We agree with the recorder that it was the appellant's duty, when stock was taken, to account for the money that he had received for stock which he had disposed of, assuming, of course, that he had not accounted already.

The judgment in *Rex* v. *Morris* [14] contains only one sentence, at p. 107, which concerns the question now under consideration, and no reasons appear to have been given or cases cited either in the argument or in the judgment for the proposition affirmed. In particular, *Balls'* case [15] was apparently not mentioned. In these circumstances, Lynskey J. in *Reg.* v. *Lawson*,[16] thought it right to hold that "if the evidence for the "prosecution . . . makes it clear that there has been a fraudulent "conversion of either the whole or a part of a general balance at "one time, it is proper to charge the conversion of a general "balance on a day between specified dates." [17]

Having reviewed the authorities and had the advantage of a most careful and thorough argument by Mr. Neil Lawson for the appellant, we have no doubt that the ruling of Lynskey J. in *Lawson's* case [17] was correct, and we can see no valid distinction between that case and the present as regards the point in question. On the view taken by the jury there was clearly a conversion, or rather an embezzlement, of one part of the aggregate at one time.

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[10] L.R. 1 C.C.R. 328.

[11] (1925) 19 Cr.App.R. 46; 42 T.L.R. 57.

[12] 19 Cr.App.R. 46, 49.

[13] L.R. 1 C.C.R. 328.

[14] (1933) 24 Cr.App.R. 105.

[15] L.R. 1 C.C.R. 328.

[16] 36 Cr.App.R. 30.

[17] Ibid.

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We have been referred to the court-martial case of *Reg.* v. *Tucker*,[18] but that court did not find it necessary to decide whether in that case it was proper to base the charge on an alleged general deficiency.

We desire to make it plain in conclusion, agreeing therein with Lynskey J., that in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging a general deficiency. What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Herington, Willings & Penry-Davey, Hastings, G. M. Nightingale, Town Clerk, Hastings.*

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[18] [1952] W.N. 537; [1952] 2 All E.R. 1074.

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Lynskey J.

REGINA *v.* MILLER.

Criminal Law—Rape—Husband and wife—Implied consent to intercourse—When revoked—Divorce proceedings pending—No separation agreement—Right to intercourse—No right to use force—Assault occasioning actual bodily harm—Mental harm.
Husband and Wife. Criminal law—Assault.

A wife left her husband and filed a petition for divorce on the ground of adultery. Evidence was given in support of her petition, but the hearing was adjourned for the husband to attend. Subsequently he met his wife and had intercourse with her against her will. On a charge against the husband of rape and assault causing actual bodily harm:—

Held, (1) that the implied consent to intercourse which a wife gives at marriage, though it might be revoked by order of a court (or, *semble*, by a separation agreement) had not, in the circumstances, been revoked, and the husband could not be guilty of rape.

Dicta in *Regina* v. *Clarence* (1888) 22 Q.B.D. 23; 5 T.L.R. 61 considered.

[Reported by E. S. FAY, Esq., Barrister-at-Law.]

(2) That the husband was not entitled to use force or violence for the purpose of exercising his right to intercourse, and if he did so he committed an assault.

Regina v. *Jackson* [1891] 1 Q.B. 671; 7 T.L.R. 382 applied.

(3) An assault causing a hysterical and nervous condition is an "assault occasioning actual bodily harm."

TRIAL ON INDICTMENT.

The accused, Peter Miller, was committed for trial, charged with rape. The indictment included an alternative count charging assault occasioning actual bodily harm. Before arraignment defending counsel moved to quash the indictment on the ground that the depositions disclosed that the woman concerned was the prisoner's wife and that in law a man could not commit rape against his wife; and, as regards the second count, on the grounds that it was no assault for a man to have intercourse with his wife, even if she were unwilling and resisted, and that the depositions disclosed no actual bodily harm. Lynskey J. held the application to be premature. The accused then pleaded Not Guilty, and at the close of the case for the prosecution counsel for the defence submitted that there was no case to answer.

E. S. Fay for the accused. At marriage a wife gives consent to intercourse, and unless and until that consent is retracted, a husband having intercourse with his wife against her will cannot be guilty of rape. The question is whether such consent was lawfully retracted in this case: unless it was, the count for rape must be bad. Hale's Pleas of the Crown asserts that a wife can never retract, and there was apparently no reported case of a man being charged as principal in the first degree of rape upon his wife until *Rex* v. *Clarke* [1] in 1949, when Byrne J. ruled that consent was revoked by a non-cohabitation clause in a separation order. It is submitted that, apart from an order of the court, to which effect must be given, the proposition in Hale is still good law, and that consent cannot be validly retracted either bilaterally, by agreement between the spouses, or unilaterally—as is the case here—by the wife's refusal. To hold otherwise would in this respect assimilate the position of a wife to that of a mistress and would weaken the institution of marriage. In *Regina* v. *Clarence*,[2] where this question was considered obiter by the Court of Crown Cases Reserved, Hawkins and Stephen JJ. and Pollock B. all said that consent could not be revoked.

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[1] [1949] 2 All E.R. 448; 33 Cr. App.R. 216.

[2] (1888) 22 Q.B.D. 23; 5 T.L.R. 61.

With regard to the count for assault occasioning actual bodily harm, the evidence is that no more force was used than was necessary to overcome the wife's disinclination. If the wife is deemed in law to consent, the husband must be entitled to use reasonable force to overcome the effect of a purported refusal without being guilty of assault, for otherwise the wife could nullify the right given by law to the husband and could effectively do in fact that which in law she may not do, namely, retract consent. Moreover, there is no evidence of "actual bodily harm," the prosecution case being merely that the wife suffered some nervous distress.

Norman J. Skelhorn for the Crown. The unqualified proposition in Hale that a husband cannot be guilty of rape upon his wife is no longer good law, if it ever was so. There must be circumstances in which a wife is entitled to refuse her consent to intercourse, and where, if the husband persists in having intercourse without her consent, he is guilty of rape, for example, where intercourse would be dangerous to her health. The judgment of Hawkins J. in *Regina* v. *Clarence* [2] represents the high-water mark of the view that rape by a husband is impossible, yet in that case he said [3] that a husband's marital privilege did not justify him in endangering his wife's health and causing her grievous bodily harm, and that in such circumstances she would be justified in resisting intercourse even to the death. Other instances in which a wife is entitled to withdraw her consent would be when the parties were living apart under a separation agreement or an order of the court. Byrne J. in *Rex* v. *Clarke* [4] enunciated the principle to be applied in these terms: "No doubt on marriage the wife "consents to the husband's exercise of the marital right of inter-"course during such time as the ordinary relations created by the "marriage contract subsist between them." In the present case divorce proceedings have been instituted and a petition is on the file, and so long as the parties were in fact living apart the ordinary relations of marriage cannot be said to exist, and the wife can be taken to have withdrawn her consent to intercourse otherwise to be implied from the marriage.

As to the second count, even where the wife is not entitled to refuse consent, the husband may not use force to effect sexual intercourse, and if he does he will be guilty of an offence. *Regina* v. *Jackson* [5] establishes that a husband is not entitled to use force in asserting his legal rights over his wife. If he cannot obtain his rights by persuasion, he must forgo them or take the consequences. If he persists and has intercourse against the will of the wife and thereby occasions her actual bodily harm, although not guilty of rape he will be guilty of an assault occasioning actual bodily harm. Actual bodily harm in this context is correctly defined in Archbold's Criminal Pleadings and Practice, 32nd ed., p. 959, as including any hurt or injury calculated to interfere with the health or comfort of the prosecutor. The evidence in this case, that the wife suffered acute mental and emotional distress which persisted until the afternoon of the following day, is sufficient to come within the definition.

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[2] 22 Q.B.D. 23.

[3] Ibid. 51.

[4] [1949] 2 All E.R. 448.

[5] [1891] 1 Q.B. 671; 7 T.L.R. 382.

Lynskey J. The accused is charged on an indictment containing two counts. The first count is that on May 21, 1953, he had carnal knowledge of Gwendoline May Miller without her consent. The second count is that he assaulted her and thereby occasioned her actual bodily harm. Before arraignment a motion was made by counsel for the defence to quash the indictment on the ground that at the time of the alleged rape Gwendoline May Miller was the wife of the accused, and also that the assault occasioning her actual bodily harm could not be supported as no more was done by the accused than was necessary to enforce a husband's marital rights. I took the view at that time that, the indictment being regular on the face of it, there was nothing at that stage on which I could act by way of quashing the indictment. The matter was argued before me, but in the end it was left open to the defence to submit that on the evidence there was no case to go before the jury on which they could convict on either of these counts.

As to the first charge, it is now clear that the complainant was the wife of the accused, and the point is taken by the defence that, in those circumstances, he cannot be guilty of the offence of rape against her. Rape is the offence of having carnal knowledge of a woman without her consent by force, fear or fraud, and it is an essential ingredient of that particular offence that it must be without the woman's consent. It is argued that, in the case of a married woman, by the contract of matrimony she gives her consent to acts of intercourse with her husband and that that consent cannot subsequently be revoked. The law on this matter was first dealt with many years ago in Hale's Pleas of the Crown. There it is said that " a husband cannot " be guilty of rape upon his wife for by their mutual matrimonial " consent and contract the wife hath given up herself in this "kind to her husband which she cannot retract."[1] At that time it was no doubt considered that that consent, once given, could never thereafter be retracted. One can well imagine that, in the days when that book was written by Sir Matthew Hale, that was the accepted view of the law, because at that time a valid marriage could not be dissolved except by death, and the only way in which a marriage could be avoided was by a private Act of Parliament. It was not an act of the judiciary, but of the legislature. As far as the law was concerned there was no power to avoid a marriage. Since then there have been numerous departures from that view of marriage. But the position as outlined by Hale, so far as I can see, has never in terms been overruled: it has been criticized by some judges, and approved by others, but the curious fact is that in the many years since Hale's Pleas of the Crown was written there is no recorded case of a man being prosecuted for the rape of his wife during marriage until *Rex* v. *Clarke*[2] before Byrne J. in 1949.

The matter was considered by way of obiter dicta by a number of judges in *Regina* v. *Clarence*.[3] That was a case where a man was charged with unlawfully and maliciously inflicting grievous bodily harm on his wife, and assault upon her occasioning actual bodily harm. It appeared that at the time the offence was committed the husband was suffering from venereal disease which he knew might infect her, and the allegation was that she had been so infected. A special court was formed to consider the matter as one of the Crown Cases Reserved, there being no fewer than 13 judges composing the court, and apparently their views differed considerably. Nine judges took one view and four took another. The majority decision was that the accused could not be convicted of the offence charged because first, there was no assault, and no inflicting by the husband of any unlawful act occasioning bodily harm. But, in the course of that case, the position of a married man with regard to rape upon his wife was considered, and again the judges took different views.

Wills J., who gave the first judgment, said[4]: "If intercourse "under the circumstances now in question constitute an assault "on the part of the man, it must constitute rape, unless, indeed, "as between married persons rape is impossible, a proposition to "which I certainly am not prepared to assent, and for which "there seems to me to be no sufficient authority."

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[1] 1 Hale P.C. 629.

[2] [1949] 2 All E.R. 448; 33 Cr. App.R. 216.

[3] (1888) 22 Q.B.D. 23; 5 T.L.R. 61.

[4] 22 Q.B.D. 23, 33.

A. L. Smith J. took the view that[5]: " At marriage the wife " consents to the husband exercising the marital right. The " consent then given is not confined to a husband when sound " in body, for I suppose no one would assert that a husband was " guilty of an offence because he exercised such right when " afflicted with some complaint of which he was then ignorant. " Until the consent given at marriage be revoked, how can it " be said that the husband in exercising his marital right has " assaulted his wife? " The interesting part of that observation is that apparently A. L. Smith J. took the view, contrary to that expressed in Hale, that a wife could revoke her consent to the right of the husband to intercourse. He does not suggest under what circumstances she can revoke it; it is left generally at large.

Stephen J., one of the greatest authorities on criminal law, said[6]: " I wish to observe . . . that I was quoted as having " said in my Digest of the Criminal Law that I thought a husband " might under certain circumstances be indicted for rape on his " wife. I did say so in the first edition of that work, but on " referring to the last edition (p. 124, note) it will be found that " that statement was withdrawn."

So far, there were three different views on the matter. Hawkins J. took the strong view that a husband could not be convicted of a rape upon his wife. He said[7]: " Rape consists " in a man having sexual intercourse with a woman without her " consent, and the marital privilege being equivalent to consent " given once for all at the time of marriage, it follows that the " mere act of sexual communion is lawful; but there is a wide " difference between a simple act of communion which is lawful, " and an act of communion combined with infectious contagion " endangering health and causing harm, which is unlawful. It " may be said that assuming a man to be diseased, still as he " cannot have communion with his wife without contact, the " communication of the disease is the result of a lawful act, and, " therefore, cannot be criminal. My reply to this argument is " that if a person having a privilege of which he may avail " himself or not at his will and pleasure, cannot exercise it " without at the same time doing something not included in this " privilege and which is unlawful and dangerous to another, he " must either forego his privilege or take the consequences of his " unlawful conduct."

[5] 22 Q.B.D. 23, 37.
[6] Ibid. 46.
[7] Ibid. 51.

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That view of the law was a dissenting judgment, and it is a judgment which would appeal to a great many people as drawing a distinction between what a woman is assenting to and what she is not; that is, she is assenting to the act of sexual intercourse, but not to another act which is dangerous to her health, and there may be circumstances in which a woman would be entitled to refuse that which is dangerous to her health. In the Divorce Court that would be an act of cruelty.

Field J. cited the passage I have quoted from Hale's Pleas of the Crown and said[8]: "The authority of Hale C.J. on such a "matter is undoubtedly as high as any can be, but no other "authority is cited by him for this proposition, and I should "hesitate before I adopted it. There may, I think, be many cases "in which a wife may lawfully refuse intercourse, and in which, "if the husband imposed it by violence, he might be held guilty "of a crime."

Finally, Pollock B. said[9]: "The husband's connexion with "his wife is not only lawful, but it is in accordance with the "ordinary condition of married life. It is done in pursuance of "the marital contract and of the status which was created by "marriage, and the wife as to the connexion itself is in a "different position from any other woman, for she has no right "or power to refuse her consent." And he quoted again from Hale. Coleridge C.J. did not deal with the matter.

There are no other authorities that I can find before 1949 in which this matter was considered, and the view which I take of the dicta of the judges in *Regina* v. *Clarence*[10] is that the statement of the law in Hale was still accepted by them because their observations were only obiter dicta, but some seemed to lean to the view that the consent given by the wife at marriage could in some circumstances be revoked. That view also appealed to Byrne J. in *Rex* v. *Clarke*.[11] That was a case in which the accused was charged with the rape of his wife at a time when a separation order, made by justices on the ground of persistent cruelty, was in force. The order contained the usual clause that the wife was no longer obliged to cohabit with her husband. In ruling on that case the judge said[12]: "As a general proposition it can be stated "that a husband cannot be guilty of a rape on his wife. No "doubt, the reason for that is that on marriage the wife consents "to the husband's exercising the marital right of intercourse

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[8] 22 Q.B.D. 23, 57.

[9] Ibid. 63, 64.

[10] 22 Q.B.D. 23.

[11] [1949] 2 All E.R. 448; 33 Cr. App.R. 216.

[12] [1949] 2 All E.R. 448.

"during such time as the ordinary relations created by the "marriage contract subsist between them. The marital right of "the husband in such circumstances exists by virtue of the "consent given by the wife at the time of the marriage and not "by virtue of the consent given at the time of each act of inter-"course as in the case of unmarried persons. Thus, the inter-"course is not by virtue of any special consent, but is based "on an obligation imposed on the wife by reason of the "marriage." The judge then cited Hale's Pleas of the Crown and continued [13]: "In the present case, the justices made an "order on March 2, 1949, on the ground of the husband's "persistent cruelty containing a provision that the wife be no "longer bound to cohabit with the husband. That order has the "effect in all respects of a decree of judicial separation, and one "result of it is that both the person and the property of the wife "are protected by it. It could be discharged if the wife com-"mitted adultery or if she voluntarily resumed cohabitation with "her husband, and by 'cohabitation,' as I understand it, is "meant intercourse when the parties have begun to live together "again, or intercourse although they are not living under the "same roof. In this case at the material time the wife had not "resumed cohabitation. The position, therefore, was that the "wife, by process of law, namely, by marriage, had given consent "to the husband to exercise the marital right during such time "as the ordinary relations created by the marriage contract sub-"sisted between them, but by a further process of law, namely, "the justices' order, her consent to marital intercourse was "revoked. Thus, in my opinion, the husband was not entitled "to have intercourse with her without her consent."

The judge differentiated the case which he was trying from the general proposition as laid down in Hale's Pleas of the Crown in that, in the case which he was trying, there had been a justices' separation order, which is the equivalent of a decree of judicial separation, and that order protects the person and the property of the wife. In other words, once that order is made, the husband has no right to interfere with the wife, her person or her property. I respectfully agree with him, and consider that that order amounted to a revocation of the consent given by the wife in the marriage contract.

The question which I have to consider here is whether, on the facts, it can be suggested that there is anything which will amount to a revocation of the wife's consent. There has been no separation order, no judicial separation and no agreement to separate. If there had been an agreement to separate, particularly if it had contained a non-molestation clause, I should have come to the conclusion that that revoked the wife's consent as well. But here the facts are that the wife committed an act of adultery as a result of which a child was born in December, 1951. The accused condoned that act of adultery and had her back to live with him. Then, in January, 1952, the wife left the accused because, according to her, he said that he would be harsh to the child born in December and who was living with them. I have not sufficient evidence to come to a conclusion whether she was right or wrong in leaving, but there has been no decree of any court, and there was never any agreement between the parties to live apart. It appears that the accused has at all times been trying to get the wife back. She offered to go back on one occasion, she says, but he would not take her, but there is a dispute about that. In January, 1953, she issued a petition for divorce, in which she alleged that her husband had been guilty of adultery. That petition came on for hearing in May, 1953, when the husband was away, but he sent a letter saying that he wanted to be heard, so the commissioner adjourned the case generally and it is still awaiting trial.

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[13] [1949] 2 All E.R. 448, 449.

Can I say that because the wife has left her husband and has brought a petition for divorce that one must infer a revocation of the wife's implied consent? I have considered the matter very carefully, and I cannot see that, because a petition for divorce has been presented, that has any effect in law upon the existing marriage. It is not until a decree nisi, or possibly a decree absolute, has been pronounced that the marriage and its obligations can be said to have been terminated. It is not as if there had been some interim order of a court. The petition might be rejected and in that event also the marriage would still be subsisting and consent to marital intercourse as given in the marriage contract still be unrevoked. The result is that I must apply the law as it stands, there being no evidence which enables me to say that here the wife's implied consent to marital intercourse has been revoked by an act of the parties or by an act of the courts. The result is that, as the law implies consent to what took place so far as intercourse is concerned (but only to that extent), the accused cannot be guilty of the crime of rape, and I shall direct the jury that there is no evidence on which they can convict the prisoner of rape.

With regard to the second count, which is a charge of assault occasioning actual bodily harm, the proposition is put forward by Mr. Fay, for the defence, that the accused, having the right to marital intercourse, is entitled, for the purpose of exercising that right, to use as much force as is reasonably necessary to enable him to do so. I have heard no case cited to support that proposition, but a case has been mentioned which, in my view, is rather against it, namely, *Regina* v. *Jackson*.[14] That was a case in which a husband had obtained an order for the restitution of conjugal rights against his wife, but she refused to return, whereupon the husband, with the assistance of an articled clerk, took possession of the person of the wife and took her off to his house, and thereafter he detained her there. She was allowed the run of the house, but was not allowed to leave the premises. The husband said that he had a right to her society, and his general rights included the right to marital intercourse, and he claimed that he had a right to do what he did. The wife took out process for habeas corpus, and the Court of Appeal held that although the husband had a right to his wife's society, and although he had a decree for the restitution of conjugal rights, he was not entitled to use force for the purpose of attaining his rights. Lord Halsbury L.C. said[15]: "I confess that some of the "propositions which have been referred to during the argument "are such as I should be reluctant to suppose ever to have been "the law of England. More than a century ago it was boldly "contended that slavery existed in England; but, if anyone were "to set up such a contention now, it would be regarded as ridicu-"lous. In the same way, such quaint and absurd dicta as are to be "found in the books as to the right of a husband over his wife in "respect of personal chastisement are not, I think, now capable "of being cited as authorities in a court of justice in this or any "civilized country." He further said[16]: "I am prepared to base "my judgment on the ground that the husband has no such "authority as he claims; that no English subject has such a right "of his own motion to imprison another English subject, whether "his wife or anyone else—of course, I am speaking of persons of "full age and sui juris; but, assuming that there were such autho-"rity, it would be subject to the qualification I have mentioned "in the case of apprehended ill-usage, and I am of opinion that "the facts of this case afford ample ground for refusing to allow "the husband to retain the custody of his wife."

It seems to me, on the reasoning of that case, that although

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[14] [1891] 1 Q.B. 671; 7 T.L.R. 382.

[15] [1891] 1 Q.B. 678.

[16] Ibid. 681.

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Lynskey J.

the husband has a right to marital intercourse, and the wife cannot refuse her consent, and although if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence in the exercise of that right, and if he does so he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant. If he should wound her he might be charged with wounding or causing actual bodily harm, or he may be liable to be convicted of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision.

The point has been taken that there is no evidence of bodily harm. The bodily harm alleged is said to be the result of the prisoner's actions, and that is, if the jury accept the evidence, that he threw the wife down three times. There is evidence that afterwards she was in a hysterical and nervous condition, but it is said by counsel that that is not actual bodily harm. Actual bodily harm, according to Archbold, 32nd ed., p. 959, includes "any "hurt or injury calculated to interfere with the health or comfort "of the prosecutor." There was a time when shock was not regarded as bodily hurt, but the day has gone by when that could be said. It seems to me now that if a person is caused hurt or injury resulting, not in any physical injury, but in an injury to her state of mind for the time being, that is within the definition of actual bodily harm, and on that point I would leave the case to the jury.

Verdict: Not Guilty of rape;
Guilty of common assault.

Solicitors: *Geoffrey Wells & Woodford, Southampton; Bernard Chill & Partners, Southampton.*

C. C. A.

1954
July 19.

Lord Goddard C.J., Cassels and Slade JJ.

REGINA v. BOYLE.

Criminal Law—Larceny—Housebreaking—Constructive—Admission to house obtained by trick for purpose of committing theft.

Criminal Law—Indictment—Separate counts—Indictment put as a whole—Pleas of "Guilty"—Practice to be followed when indictment contains separate or alternative counts.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

A person who, with intent to commit a felony, obtains admission to premises by some artifice, trick or threat, for the purpose of effecting it, commits a constructive breaking.

Where an indictment contains several counts, or alternative counts, such as larceny or receiving, the correct practice is for each count to be put separately to the prisoner, who should be asked to plead to that count as it is put to him.

The occupant of a dwelling-house admitted the appellant, who had falsely represented himself as an employee from the British Broadcasting Corporation sent to examine her radio set. While in the house the appellant stole a handbag, subsequently forging a cheque contained therein, and used it to obtain a motor-car. He was indicted for housebreaking, forging the cheque, uttering it and fraudulently obtaining property by means thereof. At the trial the appellant pleaded Guilty to the indictment which was read to him as a whole, and was sentenced to four years' imprisonment. On appeal, by leave of the court, against his conviction for housebreaking, the appellant contended that he could not, on the evidence, have been convicted of housebreaking and ought not, therefore, to have been asked to plead to that offence:—

Held, dismissing the appeal, that there was a constructive entry as the appellant had obtained admission to the house by a trick, and since he must be taken to have had a felonious intent and had obtained entry for the purpose of committing a theft, he was properly convicted of housebreaking.

APPEAL against conviction.

The appellant, George Bainbridge Boyle, pleaded Guilty at the Central Criminal Court on May 4, 1954, to an indictment containing four counts. The first count charged him with breaking and entering a dwelling-house on April 21, 1954, with intent to steal therein, and stealing therein a handbag and other articles the property of the occupant; the second, third and fourth counts charged him with forging a valuable security, namely, a cheque for £450, uttering the forged valuable security and fraudulently obtaining therewith a motor-car.

The facts relevant to this report are as follows: The appellant rang the bell of a house in Croydon and when the door was opened by the occupant he informed her that he had called from the British Broadcasting Corporation to try to locate local disturbances caused on the radio. In fact he had not been sent by the corporation, but believing that he had been so sent, the occupant admitted him into her house, showed him her radio set and left him to get a drink of water for which the appellant asked. While the occupant was out of the room the appellant stole her handbag, which contained, among other things, a blank cheque which he subsequently forged, using it to obtain the motor-car.

At the trial the indictment was read to the appellant as a whole. He pleaded Guilty, and was sentenced to four years' imprisonment. He appealed, by leave of the court, against his conviction on the first count of the indictment, admitting that he had pleaded Guilty, but contending that on the evidence he could not have been convicted of housebreaking; that he should have been charged with larceny and not with housebreaking to which offence he should not have been asked to plead.

E. Garth Moore for the appellant. An entry obtained by trickery can amount to constructive breaking but does not necessarily do so. Where admission is obtained by false pretences it is a constructive breaking only if the entry is obtained by means of a false pretence which is so fundamental as to deprive the householder's consent of its legal validity. There are no authorities in support of that proposition. The statement in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 669, is an accurate résumé of the older authorities. The nearest authority against the proposition for the appellant is in Hawkins' Pleas of the Crown, 3rd ed., c. 39, s. 5, where it is stated that "where "divers persons came to a house with intent to rob it, and "knocked at the door intending to have business with the owner, "and being by that means let in, rifled the house, they were "guilty of burglary . . . for the law will not endure to have its "justice defrauded by such evasions." That is repeated in East, Pleas of the Crown (1803), vol. 2, p. 485. No reference is specifically made to the doing of business in Blackstone's Commentaries (1769), Bk. 4, p. 227, where breaking and entering is dealt with.

All the authorities emphasize that entry obtained by trickery of some kind can amount to breaking even if the householder has given some kind of consent, but it is submitted that that proposition may be too widely stated and that it would be proper for the court, in considering an entry obtained by false pretences, to adopt the test applied in distinguishing larceny by a trick from obtaining property by false pretences. In both cases the owner's consent to the passing of property is obtained by the operation of a lie, but in one case it goes to the root of the transaction and in the other it does not. That is the basis of the judgment of Horridge J. in *Phillips* v. *Brooks*.[1] If that distinction is made with regard to the passing of property it is submitted that it ought also to be applied to crossing a threshold. It cannot be denied that the appellant had a felonious intent.

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[1] [1919] 2 K.B. 243; 35 T.L.R. 470.

Victor Durand, for the Crown, was not called on.

LORD GODDARD C.J. stated the facts and continued: The question is whether the method by which the appellant entered the house amounts to housebreaking. In the opinion of the court it does. It is constructive breaking, and the law cannot be better stated than as set out in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 669: "A constructive breaking is where the offender, with intent to commit a felony, obtains admission by some artifice, trick, or threat, for the purpose of effecting it." If, in other words, the householder would not have admitted the man had he known the true facts, and admission has been obtained by means of a trick or threat, that is in law a constructive breaking. Take the very common case where a man represents himself as having called on behalf of a gas or electric light company; if he comes from the company and enters for a proper purpose and steals when in the house, it is not breaking and entering. That is larceny in a dwelling-house because the man has not used a trick to get into the house; he has come in the ordinary course of his duty representing himself (as he is in fact) as an employee of the company whose duty it is to read the meter. In the present case the court has no doubt that the appellant did obtain entry by means of a trick, and, therefore, there was a constructive breaking, as it must be taken that he went there with a felonious intent and got in for the purpose of committing a theft. He was therefore properly convicted of housebreaking.

The real reason why the court gave leave to appeal was so that they might have an opportunity of expressing a view on the practice which has obtained for many years at the Central Criminal Court and may have obtained at certain sessions. I do not think that it obtains as a rule on the circuits. Where an indictment contains several counts it has been the habit of some courts, certainly the Central Criminal Court, to put the whole indictment to the prisoner at once and ask him to plead after it has been read to him. In the present case, for instance, there were four counts, the first count charging the appellant with housebreaking, the second count charging him with forging a valuable security with intent to defraud, the third count charging him with uttering a valuable security and the fourth count charging him with obtaining a motor-car by virtue of a forged cheque. All four counts were read to the appellant, who was then asked to plead to the whole indictment. He pleaded Guilty.

The court desires to say that in its opinion the right practice is that when the indictment contains more than one count, each count should be put to the prisoner separately, and he should be asked to plead to each particular count. It should be remembered that every count in an indictment is equivalent to a separate indictment; the prisoner can be tried on one or all of the counts. The verdicts have to be taken separately, and the right practice is that he should be asked to plead to each count as each count is read to him. There can then be no doubt as to which count the prisoner intends to plead. At the Central Criminal Court it has generally been the practice to put the whole indictment to the prisoner if he is not defended. If he is defended, the practice has been to put the counts separately and counsel has told him to which counts to plead Guilty and to which counts to plead Not Guilty.

What I have said is to be taken as applying not only to counts of a different nature but in cases where the indictment contains alternative counts. For instance, where there are counts for stealing and receiving it is much better that the two counts in the indictment should be separately put. If the prisoner pleads Guilty to the count for stealing, there is no need to put the count of receiving; but if he pleads Not Guilty the receiving count should then be put as a separate count and a plea taken upon it. No other point arises in the present case, and therefore the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

C. A.

1954
June 24, 25;
July 21.

Somervell,
Birkett and
Romer L.JJ.

In re SIMMONS & POLITZER.

Solicitor—Costs—Taxation—Agreement as to remuneration—Payment of lump sum in full settlement of solicitor's costs—Failure of solicitor to submit agreement to taxing officer for examination and allowance before receiving payment under agreement—No immunity from taxation—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *ss.* 59, 60 (5) (6), 62.

The effect of disregarding section 60 (5) of the Solicitors Act, 1932, is to deprive a solicitor who ignores it of the privilege conferred by section 62 of the Act.

Solicitors having failed to deliver to their client a proper bill of costs as required by the Solicitors Act, 1932,[1] the client issued a summons asking that the bills of fees, charges and disbursements of the solicitors be referred to a master to be taxed. At the hearing of the summons the solicitors asserted that under an agreement the client had paid to them a lump sum in full settlement of their account, and, therefore, under section 62 of the Act their costs were not subject to taxation nor to the provisions of the Act with respect to the signing and delivery of a bill of costs. The master directed an issue on the question whether there was an agreement as alleged, and the judge, in chambers, considering that if there was an agreement it should be reopened on the ground of special circumstances under section 60 (6), ordered the solicitors to deliver a bill of costs for taxation. On appeal by the solicitors:—

Held, that the solicitors, having disregarded the requirement of section 60 (5) by receiving payment of the sum due under the alleged agreement without first submitting the agreement to the taxing officer for examination and allowance by him, were disabled from claiming immunity from taxation under section 62, and must therefore deliver a bill of costs for taxation.

In re Thompson [1894] 1 Q.B. 462; 10 T.L.R. 89 considered.

Decision of Glyn-Jones J. affirmed.

APPEAL from Glyn-Jones J. (in chambers).

By summons, dated January 29, 1954, the client, R. F. H. Norman, of Douglas, Isle of Man, asked that the bills of fees, charges and disbursements delivered to him by Messrs. Simmons

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[1] Solicitors Act, 1932, s. 59: "A "solicitor may make an agreement in "writing with his client as to his re"muneration in respect of any con"tentious business. . . ."

S. 60: "(5) If the business covered "by any such agreement is business "done, or to be done, in any action, "the amount payable under the "agreement shall not be received by "the solicitor until the agreement has "been examined and allowed by a "taxing officer of the court, and if the "taxing officer is of opinion that the "agreement is unfair or unreason"able, he may require the opinion of "the court to be taken thereon and "the court may reduce the amount "payable thereunder, or order the "agreement to be cancelled and the "costs covered thereby to be taxed "as if the agreement had never been "made."

Subs. (6): "When the amount "agreed for under any such agree"ment has been paid by or on behalf "of the client or by any person "entitled so to do, the person making "the payment may at any time "within twelve months after payment "apply to the court and the court, "if it appears to them that the "special circumstances of the case "require the agreement to be re"opened, may, on such terms as may "be just, re-open the agreement and "may order the costs covered thereby "to be taxed and the whole or any "part of the amount received by the "solicitor to be repaid by him."

S. 62: "Subject to the provisions "of the two last preceding sections, "the costs of a solicitor in any case "where an agreement has been made "in pursuance of the provisions of "section fifty-nine of this Act shall "not be subject to taxation, nor to the "subsequent provisions of this Part of "this Act with respect to the signing "and delivery of a solicitor's bill."

& Politzer, solicitors, who had acted for him in certain litigation and non-contentious matters, "be referred to a master to be "taxed," and that upon payment by him of what, if anything, might appear to be due to the solicitors, they should deliver up to him all deeds, books, papers and writings in their possession, custody or power belonging to the client. At the hearing of the summons before Master Clayton the solicitors alleged an agreement under which, in consideration of the payment by the client of an agreed sum in full settlement they had delivered up to the client's then legal representatives all the said deeds, books and papers. The master, while apparently taking the view that a receipt and letter on which the solicitors relied did constitute an agreement, nevertheless directed an issue to determine that question. On March 15, 1954, the issue came before Glyn-Jones J. in chambers, and he ordered the solicitors to deliver a bill of costs in all matters in which they had been instructed as solicitors for the client, and directed that the bill so delivered be presented to the master to be taxed.

The solicitors appealed.

Gilbert Paull Q.C. and *J. T. Plume* for the solicitors. By his summons the client did not ask for an order to deliver a bill of costs, and the judge had no jurisdiction to make such an order without an amendment of the summons. The solicitors have established a written agreement for the purposes of sections 57 and 59 of the Solicitors Act, 1932, covering their remuneration both for contentious and non-contentious business, and they have received under that agreement a lump sum in full settlement. For that sum they have given a receipt, and should the master on taxation find that there was a greater sum due to them the solicitors would undoubtedly be barred by that receipt. The agreement ought not to be set aside and the solicitors are entitled to immunity from taxation of their costs by reason of the provisions of section 62 of the Act.

Cyril Harvey Q.C. and *F. C. Coningsby* for the client. It is not admitted that there was any such agreement as that on which the solicitors rely. The payment made to the solicitors was subject to an express reservation by the client of his right to have the costs in respect of which the payment was made submitted to taxation. If there was an agreement such as that for which the solicitors contend, there were "special circumstances," notwithstanding that the sum was paid, which warranted the reopening of the agreement under section 60 (6) of the Act of

1932. Moreover, as the agreement, if any, admittedly covered contentious business, the solicitors were precluded from relying on section 62 by reason of their infringement of section 60 (5) by failing to submit the agreement to the taxing officer for examination.

Cur. adv. vult.

July 21. ROMER L.J. read the following judgment of the court: This is an appeal by Messrs. Simmons & Politzer (hereinafter referred to as " the solicitors ") from an order of Glyn-Jones J., made in chambers on March 15, 1954, whereby he set aside an order of Master Clayton and ordered that the solicitors should deliver to the client, R. F. H. Norman, bills of costs in all matters in which the solicitors had been instructed as solicitors for the client, and that the bills, fees, charges and disbursements so delivered be referred to the master to be taxed.

Prior to last January the solicitors had, for some years, acted professionally for the client in various matters, including three actions which are referred to hereafter collectively as " the " Conquy litigation." In addition to these actions they had acted in some business of a non-contentious character (or mainly so) which was referred to in argument as " the Holdron matter." On January 27, 1953, the client wrote to the solicitors asking them to send him a complete statement of account and they forwarded to him, two days later, a summarized bill headed " Yourself and Conquy Costs." This document, which showed a balance of £5,112 6s. 11d. as due to the solicitors, was not drawn in sufficient detail to constitute a proper bill of costs.

The statement was accompanied by a letter, also headed " re Conquy," in which the solicitors wrote: " We might mention " the fact that having regard to your promise to be generous in " any future matter if we merely charged a nominal fee for the " Holdron matter, plus disbursements, we have not yet rendered " you a bill in respect of that matter, which we may say will " amount to a considerable sum. We have, however, " endeavoured to draw our bill in the Conquy matter upon a fair " and reasonable basis only but we would like you to know that " provided a speedy and reasonable settlement thereof be made " we shall keep to the understanding regarding Holdron, but we " must, of course, reserve our right also to deliver a bill in that " matter for our proper charges."

At some later date the solicitors rendered to the client a " cash account " showing a balance due to them of £1,678 odd.

This account, which was brought down to July, 1953, was admittedly inaccurate in certain respects.

Apparently towards the end of 1953 and early in 1954 discussions and negotiations proceeded between the client and the solicitors with regard to the amount which they claimed was due from him for costs. The client was dissatisfied with the statement and cash account which they had delivered to him, although he did in fact pay over £3,000 on account. On January 18, 1954, the solicitors were served with notice of change of solicitors, the client having appointed Messrs. Oswald Hickson & Collier to act for him in their place in connexion with the Conquy litigation.

On January 28 and 29, 1954, meetings took place between Mr. Simmons, who is a partner in the firm of Messrs. Simmons & Politzer, and Mr. Carter-Ruck, who is a partner in Messrs. Oswald Hickson & Collier, on behalf of the client. At or shortly after these interviews the solicitors proffered a further statement of account which showed a sum of £1,499 6s. 3d. as owing to them. This amount is arrived at by adding to the £5,112 6s. 11d. shown due by the earlier statement of January, 1953, a further sum "Account rendered to January, 1954," of £210 6s. 10d., and deducting £3,198 6s. 8d. "paid on account," and £625 "amount "received from Lord Camrose." If this sum of £625 be added to the £1,499 6s. 3d. the result is a total of £2,124 6s. 3d. A list of cheques which the solicitors had received from the client was attached to the statement.

The summons in the present proceedings was issued on January 29, 1954, but it was not served upon the solicitors until February 4. By it the client asks "that the bills of fees, charges "and disbursements delivered to the applicant by the . . . solicitors "be referred to the master to be taxed . . . and that upon payment "by the applicant of what (if anything) may appear to be due to "the said solicitors the said solicitors do deliver up to the applicant, or as he may direct, all deeds, books, papers and writings "in the said solicitors' possession, custody or power belonging to "the applicant." This delivery up of documents was a matter of imperative urgency to the client in connexion with the Conquy litigation, which was still pending, and he would be in a position of considerable difficulty if the solicitors insisted on retaining them under their lien for costs.

Affidavits were sworn by both sides on the hearing of the summons. This evidence disclosed an important divergence of view on what had happened at the two interviews which we have mentioned and, in a less degree, at two subsequent interviews which took place between the parties' representatives on February 1 and 2, respectively. One thing, we think, at least is clear, and that is that at none of the interviews were the solicitors informed that the summons for taxation had been issued.

At the meeting on February 2 (at which the solicitors were represented by the other partner, Mr. Politzer, owing to Mr. Simmons' absence from illness) Mr. Carter-Ruck produced a cheque for £1,074 6s. 3d. and two documents, namely, a receipt and a letter which had been drafted by him or his firm. The letter was in the following terms: "Dear Sirs, R. F. H. Norman, "Arrowbrook Overalls Ld., Marylan Overalls Ld. We now "enclose cheque value £1,074 6s. 3d. which, after taking into "account the release of the sum of £425 previously held to Lord "Camrose's account (and to which we confirm Lord Camrose has "agreed), represents the balance due on your account with Mr. "Norman. Kindly let us have your formal receipt in full and "final settlement of all outstanding costs. Yours faithfully, "Oswald Hickson, Collier & Co." The receipt was as follows: "Received by Messrs. Ernest Simmons & Eric B. Politzer of 8, "Lygon Place, Westminster, S.W.1 the sum of £1,499 6s. 3d. "One thousand four hundred and ninety-nine pounds six shillings "and three pence in full discharge of all claims costs disburse-"ments and other moneys owing to Messrs. Ernest Simmons & "Eric B. Politzer by Roland Frank Holdway Norman of Cooill "Vane, Second Avenue, Douglas, Isle of Man. Dated this 2nd day "of February, 1954." Mr. Politzer signed this receipt and thereupon handed over to Mr. Carter-Ruck all of the applicant's documents (except for a few irrelevant letters) which his firm had in their possession.

The solicitors rely on this receipt and letter of February 2, 1954, as constituting a written agreement within sections 57 and 59 of the Solicitors Act, 1932, and as a sufficient answer therefore (by reason of section 62) to the client's prima facie right to have a bill of costs delivered and to have it taxed under section 66 of the Act. The solicitors' case, in brief, as appears from the affidavit of Mr. Simmons, sworn on February 16, 1954, is that after various ways of dealing with their costs at the interviews on January 28 and 29, 1954, had been discussed he made an offer to Mr. Carter-Ruck that "if the applicant would pay the balance "in full of what we claimed in respect of the [Conquy] actions "we would accept that sum in full satisfaction of all our out-"standing charges including (inter alia) those in the Holdron "matter"; that that offer ripened into the agreement upon which his firm relies, and that on the faith of that agreement Mr. Politzer released the client's papers. He also states (and this is not, we think, in dispute) that on January 29 Mr. Carter-Ruck's cost clerk was given inspection of the client's papers which the solicitors held.

On the other hand, Mr. Carter-Ruck says in his affidavit that at the interviews on January 28 and 29 he explained that nothing was owing to the solicitors by the client in connexion with the Holdron matter as it had been agreed that only disbursements should be charged and these had been paid long ago; that Mr. Simmons told him at the first interview that there was a balance due to his firm of £1,700 but that at the second interview he corrected this figure to £2,100; and that as he (Mr. Carter-Ruck), was extremely anxious to recover for the client the papers and documents which the solicitors held, he told Mr. Simmons that his only course would be to arrange for payment of this sum of £2,100 in full and then to take the whole matter to taxation, a proposal which, he says, Mr. Simmons accepted as satisfactory. The payment of a sum of £2,124 odd was, in fact, made, and Mr. Carter-Ruck says that the payment was in pursuance of this proposal. The sum of £2,124 so paid included the amount of £625 described in the second statement of account as "received from "Lord Camrose," and a further sum of £425 which had also been previously held to Lord Camrose's account but which he agreed to release and did release to the solicitors by virtue, presumably, of some arrangement with Mr. Norman. When this summons was before the master he took the view, we were told, that the receipt and letter upon which the solicitors rely did constitute an agreement, but he directed an issue in order to have the question determined. Glyn-Jones J. thought that if there was an agreement it should be reopened and, accordingly, made the order from which this appeal has been brought.

Mr. Paull's first submission for the solicitors before us was that in any case the judge had no jurisdiction to order the delivery of a bill because the client had not asked for it by his summons. We do not think that there is any force in this submission. If the judge was right in setting aside or disregarding the alleged agreement it would follow, as a matter of course, that he would enforce the client's prima facie right to delivery of a bill, and none the less because he had not expressly asked for this relief by his summons. Mr. Paull's main submissions were, first, that the solicitors had successfully established a written agreement for the purposes of sections 57 and 59 of the Act of 1932, covering their remuneration both for non-contentious and contentious business which they had done for the client; and, secondly, that they were consequently entitled to immunity from taxation of their costs by reason of the provisions of section 62.

Mr. Harvey's answer for the client to these contentions is threefold. First, he challenges the agreement itself, and says that the payment of £2,124 which was paid to the solicitors was subject to an express reservation by the client of his right to have the costs in respect of which the payment was made submitted to taxation. Alternatively, he contends that if there was an agreement such as that which the solicitors are relying on there are "special circumstances" which warrant the reopening of the agreement, notwithstanding that the costs were paid, under section 60 (6) of the 1932 Act. Finally, he says that as the agreement, if any, covered contentious business and the costs which were paid were those alleged to have been incurred by the solicitors in and about the Conquy actions, the solicitors are precluded from relying upon section 62 because they infringed the requirements of section 60 (5).

This last point, if sound, is decisive of the case and would render irrelevant an inquiry into issues of fact upon which there is considerable difference between the parties. We propose, therefore, to consider it first. Section 60 (5) provides as follows: "If the business covered by any such agreement is business done, "or to be done, in any action, the amount payable under the "agreement shall not be received by the solicitor until the "agreement has been examined and allowed by a taxing officer "of the court, and if the taxing officer is of opinion that the agree- "ment is unfair or unreasonable, he may require the opinion of "the court to be taken thereon and the court may reduce the "amount payable thereunder, or order the agreement to be "cancelled and the costs covered thereby to be taxed as if the "agreement had never been made."

It is not at first sight easy to discover what results were intended by Parliament to follow upon a disregard of this provision, for unlike subsections (7) and (8) of section 60 no express sanction is imposed on a solicitor for its infringement. It was suggested in argument by Mr. Paull that such sanction is to be found in subsection (6), so that if payment is received without reference to a taxing officer the agreement under which it was made can be reopened, but only if there are special circumstances justifying such a course. Subsection (6) reads as follows: "When "the amount agreed for under any such agreement has been paid

" by or on behalf of the client or by any person entitled so to do, " the person making the payment may at any time within twelve " months after payment apply to the court and the court, if it " appears to them that the special circumstances of the case " require the agreement to be reopened, may, on such terms as " may be just, re-open the agreement and may order the costs " covered thereby to be taxed and the whole or any part of the " amount received by the solicitor to be repaid by him."

In our judgment, the court can reopen an agreement covering contentious business even though the agreement has been approved by a taxing officer: *In re Stuart.*[1] In that case payment had not been received. The Act then in force was the Attorneys and Solicitors Act, 1870. The application was not under section 10 of that Act (the then equivalent of section 60 (6)), but under section 9, which gave the court a general power to set aside agreements which were not fair or reasonable and order taxation. This provision is now to be found in section 60 (4) (*b*). Clearly that provision cannot be regarded as the sanction for a failure to observe the terms of section 60 (5), because it can be invoked even though approval under section 60 (5) has been obtained. A fortiori, it would seem that section 60 (6) could be invoked, although approval had been obtained and the sanction therefore must be sought elsewhere. In any case, the right of a client to delivery of a bill and taxation if, and only if, he can establish " special circumstances," seems to us to be an inadequate redress against a solicitor who acts in defiance of subsection (5).

In our judgment the effect of disregarding subsection (5) is to deprive a solicitor who ignores it of the privilege conferred by section 62 of the Act. That section, which is to much the same effect as section 15 of the Attorneys and Solicitors Act, 1870, provides as follows: " Subject to the provisions of the two last " preceding sections, the costs of a solicitor in any case where " an agreement has been made in pursuance of the provisions " of section fifty-nine of this Act shall not be subject to taxation, " nor to the subsequent provisions of this Part of this Act with " respect to the signing and delivery of a solicitor's bill." The conclusion which we have expressed is supported by such authority as there appears to be upon the subject.

Subsection (5) of section 60 of the Act of 1932 made its first legislative appearance, and in very similar language, in the form of a proviso to section 4 of the Act of 1870. Sir George Jessel M.R. expressed himself as follows with regard to that section: "The meaning of section 4 . . . is that a solicitor may make "what agreement he likes with his clients, but that he is not "to receive any payment under it unless the taxing master considers it fair and reasonable; and if he does not consider it so, he "may require the opinion of the court or judge to be taken on it." (*In re Attorneys and Solicitors Act*, 1870.[2]) A similar view was expressed in *Ray* v. *Newton*,[3] where Farwell L.J. said that the proviso to section 4 of the 1870 Act "makes the inquiry into the "agreement, when a prima facie case is made, a condition precedent to the receipt by the solicitor of any money under it." In *Clare* v. *Joseph*[4] Fletcher Moulton L.J. said, with reference to sections 4 to 15 of the 1870 Act, "That group concludes with a "section of great importance (section 15), which provides that "where an agreement has been made in accordance with section 4, "and has not been set aside, the ordinary provisions as to delivery "and taxation of a duly signed bill of costs are no longer to have "effect. This gives to a solicitor who comes under this group "of sections an advantage not previously given to him. In my "opinion section 4 only prescribes the mode in which the solicitor "can obtain for himself (and I think also in which the client can "obtain for himself) the benefit of the group of sections from "section 4 to section 15. If either the solicitor or the client "wants the privileges which those sections give him, he must "comply with the requirements of section 4 and must have "an agreement in writing, but if he does not want the benefit "of those sections, section 4 imposes no duty upon him. It is "only those who wish to come under those sections who must "take the steps prescribed by section 4." In the same case Lord Alverstone C.J. had pointed out in his judgment that the 1870 Act gave a solicitor "certain rights which he did not previously "possess, provided that he himself complied with the requirements of the Act."

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[1] [1893] 2 Q.B. 201; 9 T.L.R. 545.

During the argument our attention was directed to one reported decision in which the court does seem to have disregarded the requirements of the proviso to section 4 of the Act of 1870. The case was *In re Thompson*.[5] In that case an agreement had been made between a solicitor and his client of a kind which attracted the operation of the proviso and the solicitor had received payment under it without reference to a taxing officer. The client applied for taxation notwithstanding the agreement. The points which were dealt with in the judgments of the Divisional Court were whether the solicitor was able to rely on the agreement although he had not signed it and whether there had been "payment" within section 41 of the Solicitors Act, 1843. The court answered both of these questions in the affirmative and declined to direct taxation of the solicitor's bill. Counsel for the client had argued (inter alia) that the agreement had not been examined and allowed by an officer of the court. This point was not expressly noticed in the judgments. but the court must presumably have rejected it, for otherwise it could hardly have held the solicitor to be entitled to rely on the agreement and refused an order for taxation.

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[2] (1875) 1 Ch.D. 573.

[3] [1913] 1 K.B. 249, 255.

[4] [1907] 2 K.B. 369, 377; 23 T.L.R. 498.

[5] [1894] 1 Q.B. 462; 10 T.L.R. 89.

As the judges did not deal with the point or refer to it in any way we cannot regard the case as a satisfactory authority for the view that a solicitor can disregard section 60 (5) with impunity, and such a view seems to us inconsistent with the expressions of judicial opinion which we have already cited and with a proper reading of sections 57 to 62 of the Act as a whole. In our opinion a solicitor can only rely on section 62 of the 1932 Act, and claim the privileges which it confers, if he has duly observed the requirements which the earlier sections impose. It follows that as the solicitors in the present case, in purported pursuance of the agreement which they have sought to establish, received payment of the sum due thereunder without first submitting the agreement to the taxing officer for examination and allowance by him, they are disabled from claiming immunity from taxation under section 62.

On this view it becomes unnecessary to consider whether the receipt and letter upon which the solicitors rely did or did not constitute an agreement for the purposes of section 59 of the Act; or, on the footing that it did, whether "special circumstances" have been shown to exist such as would warrant the court in requiring such agreement to be reopened under section 60 (6). Upon the first of these questions we should have felt considerable hesitation in holding, on the material now before us, that the solicitors had proved an agreement. We have earlier referred to Mr. Carter-Ruck's account, as stated in his affidavit, of what took place at the interviews on January 28 and 29, 1954; and he said, further, in paragraph 7 of his affidavit "that it was "known throughout by Mr. Simmons and by his firm that I was "reserving Mr. Norman's rights as regards taxation and that I "was only making payment in full on behalf of Mr. Norman "because of the supreme urgency of obtaining the documents and "papers." Notwithstanding the apparently unqualified terms of the receipt we think it would be difficult to disregard this sworn evidence of Mr. Carter-Ruck without cross-examination. It is, moreover, to be observed that the letter of Messrs. Oswald Hickson & Collier of February 2, 1954, which accompanied their cheque and the receipt, begins with a reference, in effect, to the Conquy litigation alone, which to some extent supports Mr. Carter-Ruck's impression that what he was paying were the costs of that litigation and that the Holdron matter was outside the picture altogether.

Having regard to these and other elements in the evidence it would be unsafe, in our opinion, to accept one version and reject the other on affidavit evidence alone and we feel sympathy with the attitude of Master Clayton in directing an issue as to whether there had been an agreement between the solicitors and the applicant. However, this question does not in fact arise if we are right in our conclusion that even if there was an agreement the solicitors, by their disregard of section 60 (5) of the Act, cannot now rely upon it.

Mr. Paull intimated that his clients will be in a difficulty in delivering a bill of costs as ordered by the judge because they have parted with the client's papers and cannot very well prepare their bill without them. Mr. Harvey for the client, however, offered to make the papers available for the purpose and obviously the client must provide the solicitors with such facilities as they may reasonably require. Our order should, we think, give either party liberty to apply to the master in the event of any difficulty arising. Subject to this, the appeal should, in our opinion, be dismissed.

Appeal dismissed.

Solicitors: *Ernest Simmons & Eric B. Politzer; Oswald Hickson, Collier & Co.*

A. W. G.

1954
July 9.

Havers J.

DUCHIN *v.* SWANAGE URBAN DISTRICT COUNCIL.
SAME *v.* DORSET COUNTY COUNCIL.

[1952 D. No. 1667.]
[1952 D. No. 1668.]

Practice and Procedure—Writ—Renewal—Order for renewal indorsed on affidavit prior to last day for renewal—Writ resealed after last day for renewal — Renewal effected by resealing — Indorsement on affidavit insufficient to keep writ alive—R.S.C., Ord. 8, *r.* 1; *Ord.* 28, *r.* 11.

On August 5, 1953, on an application under R.S.C., Ord. 8, r. 1, the practice master renewed for one month a writ of summons, the order for renewal, dated August 5, being indorsed upon the affidavit in support of the application. On August 6, 1953, the last day for renewing the writ, the plaintiff ascertained the order made by the master and, considering the period insufficient, asked to see the master. The master was not available on that day and the plaintiff, believing that the indorsement on the affidavit would be sufficient to keep the writ alive for one month, postponed formal renewal. On August 11, 1953, the master amended the original order so as to renew the writ for a period of six months, and on the same day the writ was resealed with the renewal date August 11, 1953:—

Held, that although under Ord. 8, r. 1, an order for the renewal of a writ must first be obtained, the actual renewal of a writ is effected by the resealing of the writ in the manner prescribed by the order; that the indorsement on the affidavit, therefore, was not sufficient to keep the writ alive and the writ, not having been resealed by August 6, was no longer in force on August 11, and, subject to the discretionary power of the court (which there were no grounds for exercising in the present case) to enlarge the time under Ord. 64, r. 7, was incapable of renewal upon that date.

Nazer v. *Wade* (1861) 1 B. & S. 728 and *Evans* v. *Jones* (1862) 2 B. & S. 45 applied.

Under Ord. 8, r. 1, an order for renewal, though usually made for six months, may be made for any period not exceeding six months.

SUMMONS adjourned into open court for judgment.

The following statement of facts is taken substantially from the judgment of Havers J.: On August 7, 1952, the plaintiff, Edgar Duchin, issued a writ against the Swanage Urban District Council claiming damages for personal injuries and consequential loss caused by the negligence of the defendants their servants or agents, in relation to the construction or reconstruction of a certain road and sea-wall at Swanage without providing a railing or wall between the road and the foreshore. After the issue of the writ, notice was given by letter to the defendants informing them of the action, but the writ was not, in fact, served, and on August 5, 1953, an application was made ex parte for its renewal.[1] The affidavit in support of the application was as follows:

"The plaintiff wishes to apply for renewal of the said "writ beyond the period of twelve months from the date of "issue. The reasons for this are set out below. The events out "of which this action arose took place late at night on August 11, "1951, at Swanage in the county of Dorset. The plaintiff was "then on holiday in Swanage aforesaid and was returning to the "house there at which he was staying after having visited a "friend. The night was dark and stormy and the plaintiff fell "from the Shore Road, Swanage, aforesaid, to the beach below. "At the place where the plaintiff fell the sea wall was not "protected. Counsel has advised the plaintiff that the circum-"stances appear to establish misfeasance on the part of both the "Dorset County Council as the highway authority in respect of "the said Shore Road and also the Swanage Urban District "Council as agent for the said Dorset County Council in the con-"struction of the said sea wall. The plaintiff suffered considerable "injury and loss as the result of the said accident but the medical "evidence is not yet complete and counsel has advised that active "steps should not be taken against either the Dorset County "Council or the Swanage Urban District Council until further "medical evidence shall have been obtained. In order to protect "the rights of the plaintiff against the Dorset County Council and

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[1] R.S.C., Ord. 8, r. 1: "No "original writ of summons shall be "in force for more than twelve "months from the day of the date "thereof, including the day of such "date; but if any defendant therein "named shall not have been served "therewith, the plaintiff may, before "the expiration of the twelve months, "apply to the court or a judge for "leave to renew the writ; and the "court or judge, if satisfied that "reasonable efforts have been made to "serve such defendant, or for other "good reasons, may order that the "original or concurrent writ of sum-"mons be renewed for six months "from the date of such renewal inclu-"sive, and so from time to time "during the currency of the renewed "writ. And the writ shall in such "case be renewed by being marked "with a seal bearing the date . . . "of such renewal; such seal . . . to be "impressed upon the writ by the "proper officer, upon delivery to him "by the plaintiff . . . of a memoran-"dum in Form No. 18 in Appendix "A, Part I . . . and a writ of sum-"mons so renewed shall remain in "force. . . ." r. 2: "The pro-"duction of a writ of summons pur-"porting to be marked with the seal "of the court, showing the same to "have been renewed in manner afore-"said, shall be sufficient evidence of "its having been so renewed, and of "the commencement of the action as "of the first date of such renewed "writ for all purposes."

"the Swanage Urban District Council under the Limitation Act, "1939, the writ of summons in this action and the writ of summons in the concurrent action between the said Edgar Duchin "and the Dorset County Council were both issued on August 7, "1952. The plaintiff does not wish to serve the writ of summons "in this action at the present time because for the reasons set "out above counsel has advised that such writ should not now "be so served."

The affidavit was duly deposited with the master's secretary on August 5, 1953, together with the original writ and the appropriate lodgment fee. Master Burnand indorsed the affidavit as follows: "The reasons given for not serving are insufficient. The "defendants are entitled to know the action pending. Renew "for one month." He initialled that and put the date August 5, 1953.

On August 6 the managing clerk of the plaintiff's solicitor attended at the office of the master's secretary and ascertained the order indorsed by Master Burnand on the previous day upon the affidavit. The managing clerk informed the master's secretary that the renewal would not be sufficient for the plaintiff and that he would like to see Master Burnand. The master's secretary informed the managing clerk that Master Burnand was not available but would be practice master the following day, August 7, 1953, and that the formal renewal could be postponed until he had been seen, the master's order indorsed on the affidavit being sufficient to keep the writ alive for one month.

August 6, 1953, was the last day for renewing the writ and on August 7 the managing clerk attended at the Central Office and discovered that Master Burnand was not the practice master on that day and would not be practice master again until August 11, 1953. Accordingly, on August 11 the managing clerk attended again before Master Burnand, when the master amended his original order so as to renew the writ for a period of six months; the indorsement on the affidavit being altered by striking out the words "one month" and substituting the words "six months." There was a fresh initial on the old date as still left and no fresh date was indorsed upon the affidavit.

The writ was then taken to the appropriate office and was sealed with the renewal date, August 11, 1953. It was served on February 4, 1954, accompanied by the statement of claim in the action. On February 11, 1954, conditional appearance was entered by the defendants who, on February 17, 1954, issued a summons to set aside the writ and service. On March 31, 1954, the plaintiff made a cross-application for rectification of the irregularity, asking that the seal of the court bearing the date August 11, 1953, affixed to the writ of summons be rectified and the date August 5, 1953, substituted therefor, or that the time allowed for affixing the seal pursuant to the order of Master Burnand dated August 5, 1953, be extended to August 11, 1953, or to the date of drawing up the master's order.

On April 13, 1954, Master Harwood ordered that the writ of summons and the service be set aside on the grounds that the proceedings, the writ and the renewal were irregular and that the defendants would be thereby deprived of a good defence under section 21 of the Limitation Act, 1939, extending the Public Authorities Protection Act, 1893. The master made no order on the plaintiff's cross-application for rectification except that the plaintiff should pay the defendants' costs.

The plaintiff appealed.

The facts in the action brought by the same plaintiff against the Dorset County Council were identical with the facts set out above.

Neil Lawson for the plaintiff.

M. Dunbar Van Oss for the defendants.

Cur. adv. vult.

July 9. HAVERS J. read the following judgment: These appeals arise out of two actions in which there was the same plaintiff, Edgar Duchin, and the respective defendants were the Swanage Urban District Council and the Dorset County Council. As the facts regarding each of these appeals are identical it is only necessary for me to recite the facts in one of the cases and the judgment which I give in that case will apply to both cases. I propose to take the action by the plaintiff against the Swanage Urban District Council as that was the action in respect of which the appeals were argued before me. There are two appeals in each of these two actions.

[His Lordship stated the facts in the plaintiff's action against the Swanage Urban District Council as set out above and continued:] I have heard these appeals in chambers and as they raised a question of construction of the Rules of the Supreme Court and also matters of general interest, on the request of the parties, I reserved my judgment so that it could be delivered in open court.

Mr. Neil Lawson, on behalf of the plaintiff, contended that

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on the true construction of Ord. 8, r. 1, the order for the renewal of the writ was effective or, alternatively, that the writ remained in force if the order for renewal was made within twelve months notwithstanding that the sealing took place after the expiration of the twelve months. Upon this footing he contended that the master had jurisdiction under the slip rule, Ord. 28, r. 11, to rectify the order which he had made on August 5 by altering the period of renewal from one month to six months. Alternatively, he contended that the master made an order on August 5 for renewal of the writ for one month and during this period of renewal made a fresh order for renewal on August 11 for six months.

Mr. Van Oss, for the defendants, contended that the making of the order preceded renewal and that the renewal was effected by the sealing of the writ in the manner prescribed in Ord. 8, r. 1. He also contended that the master had purported to amend his previous order, which he had no power to do under Ord. 8, r. 1, and that he had not purported to make a new order on August 11.

The procedure for the renewal of a writ originated in section 11 of the Common Law Procedure Act, 1852, which provided that "No original writ of summons shall be in force for more than "six months from the day of the date thereof, including the day "of such date; but if any defendant therein named may not "have been served therewith, the original or concurrent writ of "summons may be renewed at any time before its expiration, "for six months from the date of such renewal, and so from "time to time during the currency of the renewed writ, by being "marked with a seal, bearing the date of the day, month, and "year of such renewal, such seal to be provided and kept for "that purpose at the offices of the masters of the said superior "courts, and to be impressed upon the writ by the proper officer "of the court out of which such writ issued, upon delivery to him "by the plaintiff or his attorney of a praecipe in such form as "has heretofore been required to be delivered upon the obtaining "of an alias writ; and a writ of summons so renewed shall remain "in force and be available to prevent the operation of any statute "whereby the time for the commencement of the action may be "limited, and for all other purposes, from the date of the issuing "of the original writ of summons."

My attention was called to two cases which had been decided upon that section. It is clear that under this section renewal of a writ could be obtained by a plaintiff as of right at any time before its expiration and so from time to time during the currency of the renewed writ by having the writ impressed by the proper officer of the court with a seal on the plaintiff delivering to such officer a praecipe in the prescribed form together with the appropriate fee.

The first of the two cases to which I was referred was *Nazer* v. *Wade*,[1] of which the headnote reads: "On the day of the expiration of a writ of summons issued under the Common Law "Procedure Act, 1852 (15 & 16 Vict. c. 76), the plaintiffs' "attorney attended at the office for the purpose of having it "renewed, and paid the fee; but being suddenly called away "omitted to get the seal impressed in pursuance of section 11, "and did not discover the mistake until it was too late to keep "the writ alive by resealing, so as to save the Statute of Limitations: held, that the court had no power to direct the officer to "impress the seal on the writ as of the day when the attorney "applied to have it renewed; but that it would have been "otherwise if the omission to reseal the writ had been occasioned "by a fault of the officer of the court."

The second case was *Evans* v. *Jones*.[2] The headnote there was: "The last day for resealing a writ of summons, so as to "save the Statute of Limitations, expired on Saturday, December 28, within the Christmas holidays. A party who attended "at the office on that day for the purpose found it shut, and the "officer having refused to reseal the writ on the following Monday, the 30th, the court refused to order him to do it afterwards, "nunc pro tunc." In the course of argument Crompton J. stated that [3] "If the not resealing this writ had been the fault of one of "our officers, we should order him to do it nunc pro tunc. But "here the application was made at a time when the officer was "not bound to be at his office; and the case is the same as if it "had been made on the last day allowed by law at an hour when "the office was closed."

It is clear from these cases that under section 11 of this Act the writ was renewed when resealed and if it was not resealed within the period of six months the court would not order it to be resealed unless the failure to reseal was due to the fault of an officer of the court.

The practice today as regards renewal is governed by Ord. 8. [His Lordship read Ord. 8, r. 1, and continued:] There was an important change under Ord. 8. Instead of the renewal as

[1] (1861) 1 B. & S. 728.

[2] (1862) 2 B. & S. 45.

[3] Ibid. 46.

a matter of course, the plaintiff now has to satisfy the master either that reasonable efforts had been made to serve such defendant or give him other good reasons and that was a condition precedent to the obtaining of an order for renewal. [His Lordship read rule 2 and continued:] In the Queen's Bench Division the practice is to leave the appropriate affidavit and the original writ in the master's secretary's department and, after the master has made his decision, to obtain the indorsed affidavit. The writ and affidavit are then filed and the writ is sealed "Renewed." The note of the Annual Practice, 1954, p. 60, adds this comment: "The application should be made a few days before the time "expires. The writ will not be sealed as being renewed on a "date subsequent to the expiration of its currency."

Mr. Lawson contended before me that under Ord. 8, r. 1, the procedure for renewal consisted of two stages, namely, the first stage, the judicial act of making an order which was discretionary, and the second stage, the purely ministerial act of impressing a seal upon the writ. He argued that if the judicial act was done within a stipulated period the writ remained in force for service even though the ministerial act was not done until after the expiration of the stipulated period. I am unable to accept that argument. In my view, although an order for renewal must now first be obtained, the renewal is still effected by the sealing of the writ in the manner prescribed by the order. The form of the order which can be seen at p. 2,756 of the Yearly Practice of the Supreme Court (1940) was in these terms: "It is ordered that the writ in this action be renewed for six "months from the date of its renewal" although it appears that as a general rule the order need not be drawn up, a memorandum endorsed under Ord. 52, r. 14, being sufficient.

The writ was, therefore, in my opinion, no longer in force (for the purpose of service) on August 11, 1953, and subject to Ord. 64, r. 7, was incapable of renewal upon that date. It is quite true that the court has power under Ord. 64, r. 7, to enlarge the time, but the practice is not to do so after the expiration of twelve months from the date of the writ or of six months from the date of the last renewal thereof, where, but for such enlargement of time, the plaintiff's claim would be barred: see *Hewett* v. *Barr*[4] and *Battersby* v. *Anglo-American Oil Co. Ld.*[5] It is not quite clear whether the master was asked to exercise his discretion under Ord. 64, r. 7, although I gather that he was. If he was asked to do so, on the facts of this case I see no grounds for disturbing the exercise of his discretion, and if I had to exercise my own discretion I should certainly have exercised it in the way he did.

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[4] [1891] 1 Q.B. 98.

[5] [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387.

I will now consider the next points that were argued by Mr. Neil Lawson. I am satisfied that on August 5 the master took the view that the plaintiff had put forward very slender grounds for the renewal and accordingly in the exercise of his discretion he ordered the renewal for one month only. It may well be that the master had in mind the passage in the judgment of Lord Goddard in *Battersby* v. *Anglo-American Oil Co. Ld.*,[5] where he said[6]: "We conclude by saying that, even when an "application for renewal of a writ is made within twelve months "of the date of issue, the jurisdiction given by the rule ought to "be exercised with caution. It is the duty of a plaintiff who "issues a writ to serve it promptly, and renewal is certainly not "to be granted as of course on an application which is necessarily "made ex parte. In every case care should be taken to see that "the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court "is satisfied that good reasons appear to excuse the delay in "service, as, indeed, is laid down in the order. The best reason, "of course, would be that the defendant has been avoiding "service, or that his address is unknown, and there may well be "others, but ordinarily it is not a good reason that the plaintiff "desires to hold up proceedings while some other case is tried "or to await some future development. It is for the court and "not for one of the litigants to decide whether there should be "a stay, and it is not right that people should be left in ignorance "that proceedings have been taken against them if they are here "to be served."

It seems to me, however, that the master was subsequently persuaded that the period of one month would not be adequate and he decided to increase the period to six months. It seems clear to me, however, that he did not make or intend to make a fresh order but he amended his original order by striking out "one month" and substituting "six months." It will be observed that he did not give a new date to the amended order. In my opinion there was no clerical mistake in the order or accidental slip or omission and the master had no jurisdiction to amend the order of August 5 under Ord. 28, r. 11.

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[5] [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387.

[6] [1945] K.B. 23, 32.

Mr. Lawson also argued that the only period for which an order for renewal can properly be made under Ord. 8, r. 1, is for six months, and that the master was on August 11 merely rectifying an error which he had made by mistake. I hold, however, that under Ord. 8, r. 1, an order for renewal, though usually made for six months, may be made for any period not exceeding six months. Moreover, I am satisfied that in making his order of August 11, the master was not seeking to rectify an error of law which he believed he had made, but to grant an additional period which he then thought, in the light of further argument addressed to him, was appropriate. Further, the master would not in my view have jurisdiction to rectify an error of law, if he made one, under the slip rule. It follows that I am of opinion that the order of Master Harwood setting aside the writ and service was correct and the appeal against that order should be dismissed.

As to the second appeal, I see no ground for disturbing the master's refusal to order that the date of the seal be rectified or that the time allowed for affixing the seals be extended. The plaintiff had the whole of August 6 in which he could have taken the necessary steps to get the seal affixed to the writ in pursuance of the order of the master dated August 5, but he failed to do so. The failure to affix the seal on August 6 could not, in my view, be attributed to the fault of the officer of any court in refusing to affix the seal on that day. I hold, therefore, that the appeal against this order is also dismissed.

In the second action, against the Dorset County Council, as I have already said, the facts relating to these applications and appeals are identical and it is unnecessary for me to recite them. The judgment which I have just given in the case against the Swanage Urban District Council applies also to those appeals and they are both dismissed.

Judgment for the defendants.

Solicitors: *Alexander A. Kassman; William Charles Crocker.*

J. F. L.

S. L. DANDO LD. *v.* HITCHCOCK AND ANOTHER.

C. A.

1954
Apr. 8, 9.

Lord Goddard C.J., Denning and Birkett L.JJ.

[Plaint No. J. 304.]

Landlord and Tenant—Rent restriction—Personal occupation—Vicarious occupation—Agreement between tenant and original landlord that tenant's manager should occupy house — Claim for possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

A clause in a tenancy agreement for a house within the Rent Acts provided that "either the tenant or his present manager" should reside in it. The manager and his family went into occupation, the tenant never residing nor intending to reside in it. Later the contractual tenancy was determined. In proceedings by the landlord for possession:—

Held, that the tenant was not entitled to the protection of the Rent Acts, the policy of which was to protect a tenant who was in personal occupation of his home; and that, accordingly, the landlord was entitled to an order for possession.

Cove v. *Flick* (post, p. 326) considered.

Hiller v. *United Dairies (London) Ld.* [1934] 1 K.B. 57; 50 T.L.R. 20 applied.

Wabe v. *Taylor* [1952] 2 Q.B. 735; [1952] 2 T.L.R. 264; [1952] 2 All E.R. 420 distinguished.

APPEAL from Judge Norman Daynes, sitting at High Wycombe County Court.

By an agreement dated December 21, 1945, made between one Parker and the first defendant, Hitchcock, Parker let a farmhouse and 1½ acres of land on a yearly tenancy to Hitchcock, clause 3 (3) of the agreement providing that "either the tenant or his "present manager, Austen Paynter" (the second defendant) "is "to reside on the premises and not to part with the possession of "any part thereof." The manager moved into the house with his family, and continued to live there, later entering into partnership with Hitchcock in a dairy business which was carried on in part of the premises. Hitchcock did not at any material time live in the house nor had he ever intended to live there.

In 1953, the plaintiff company, S. L. Dando Ld., bought Parker's interest in the premises, and served notice to quit on the tenant Hitchcock, thereby determining the contractual tenancy. They applied to the county court for an order for possession, which the defendants resisted, inter alia, on the ground that the defendant Hitchcock retained possession of the premises within the meaning of section 15 (1) [1] of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The county court judge on February 1, 1954, found that the first defendant had bare legal possession of the house but had never occupied; and that his manager had been the occupier of the house at all material times as the licensee (and neither the assign nor the subtenant) of the first defendant. He said that it was common ground between the original landlord and the first defendant that the tenant was providing a home for another, and held that where a tenant had legal possession of a dwelling-house which was occupied by another with the knowledge and consent of the landlord, such occupation was sufficient to support the conclusion that the tenant retained possession within the meaning of section 15 (1), since the Act aimed at the protection of homes, including all homes established by the original lettings. He expressed the view that his decision was consistent with two other decisions of county court judges, *Kirk* v. *Shriebhand* [2] and *Gapps Ld.* v. *Hedges and Ley*,[3] neither of which had to his knowledge been adversely criticized; and added that in *Wabe* v. *Taylor*,[4] Birkett L.J. had based his judgment in part on Mr. Megarry's conclusion at p. 155 of the sixth edition of The Rent Acts that those decisions were on the right lines. He gave judgment for the defendants and refused the order for possession.

The plaintiff company appealed.

Desmond Neligan for the plaintiff company. The tenant of a house is not entitled to the protection of the Rent Acts on the termination of his contractual tenancy, when he himself has never lived on the premises, and never intends to do so. Paynter, the manager, was a mere licensee, his only right to occupation being at the will of the tenant, and he had no rights against the landlord save through the tenant. Though in certain circumstances the presence of a licensee in a house may give the tenant the protection of the Acts, that can only arise where there is an "animus revertendi" on the part of the tenant. There must be some outward and visible sign of possession coupled with and showing an intention to reside. In *Hicks* v. *Scarsdale Brewery*[5] it was decided that "possession" in the Acts means "actual possession"; that was approved in *Haskins* v. *Lewis.*[6] Since *Skinner* v. *Geary*,[7] the facts in which are not altogether unlike those in the present case, it has been settled that a limited company cannot "retain possession" within the meaning of section 15 (1) of the Act of 1921, because a company cannot reside: see *Reidy* v. *Walker.*[8] That principle applies equally where a company occupies by its manager: *Hiller* v. *United Dairies (London) Ld.*[9]

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15: "(1) A tenant who by virtue "of the provisions of this Act retains "possession of any dwelling-house to "which this Act applies shall, so "long as he retains possession, "observe and be entitled to the bene"fit of all the terms and conditions "of the original contract of tenancy, "so far as the same are consistent "with the provisions of this Act, and "shall be entitled to give up posses"sion of the dwelling-house only on "giving such notice as would have "been required under the original "contract of tenancy. . . ."

[2] [1947] Estates Gazette Digest 248.

[3] [1950] Estates Gazette Digest 255.

[4] [1952] 2 Q.B. 735, 740; [1952] 2 T.L.R. 264; [1952] 2 All E.R. 420.

The whole weight of the authorities is against the proposition that a statutory tenant can "retain possession" by the occupation of his licensee. If the county court judge is right, the odd result might follow that the first defendant here might, if he extended his business, have statutory tenancies in half-a-dozen different places. It is submitted that the county court decisions on which the judge relied were wrongly decided.

The "husband and wife" cases are remote from the present case. It has always been made clear that those decisions depend on the special relationship existing between the parties. The decisions should not be extended to the circumstances of the present case.

Alan de Piro for the defendants. The effect of clause 3 (3) of the contract of 1945, which is mandatory in its terms, is equivalent to a promise by the landlord that he will treat the occupation of the manager as the occupation and possession of the tenant. The policy of the Rent Acts is to protect the home of the tenant: see *per* Scrutton and Romer L.JJ. in *Haskins* v. *Lewis.*[10] *Skinner* v. *Geary*[11] is clearly distinguishable, for there the tenant had ceased to occupy the house. But here the original occupier and his wife and family have remained in occupation.

[The court called attention to *Cove* v. *Flick*[12] (not then reported), and suggested that it covered the present facts and was destructive of the present submissions.]

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[5] [1924] W.N. 189.

[6] [1931] 2 K.B. 1; 47 T.L.R. 195.

[7] [1931] 2 K.B. 546; 47 T.L.R. 597.

[8] [1933] 2 K.B. 266; 49 T.L.R. 386.

[9] [1934] 1 K.B. 57; 50 T.L.R. 20.

[10] [1931] 2 K.B. 1, 14, 18; 47 T.L.R. 195.

[11] [1931] 2 K.B. 546; 47 T.L.R. 597.

[12] Post, p. 326.

In *Cove* v. *Flick*[12] the court rejected the claim to protection because no one could say from the evidence of a casual conversation that the basis of the contract was that persons other than the tenant should live in the premises. It is distinguishable on its facts. The present case raises the question which it was said in *Cove* v. *Flick*[12] would be decided when it arose. Equally distinguishable are the cases of limited companies. The whole basis of the decision in *Hiller* v. *United Dairies (London) Ld.*[13] was that a company could never have the statutory tenancy because it could not reside as a legal entity.

[Lord Goddard C.J. Why should an individual who says that he never intends to occupy, and never has done, be in a better position than a company? The court ought not to strain the Acts to protect a person in occupation who is not the tenant; and here the manager was never the tenant.]

He is the alter ego of the tenant and not merely his agent. In *Robson* v. *Headland*[14] Tucker L.J. clearly contemplated a case where occupation by a stranger would be equivalent to the occupation of the tenant.[15] In *Wabe* v. *Taylor*[16] Somervell L.J. envisaged a similar possibility when he said that "it is clear "that the protection of the Rent Acts is not lost if, although a "tenant is absent, he is regarded in law as still occupying, in "possibly more ways than one."[17]

[Birkett L.J. *Wabe* v. *Taylor*[18] was a departure from the principle laid down in *Skinner* v. *Geary*[19] in that the tenant was not occupying and had no intention of returning; but the court said they would regard his wife as being in the position of the tenant. Is it right to extend that to every case where the tenant is out of occupation with no animus revertendi, but where someone under a contract like the present is occupying? Is that someone to have the protection of the Acts? It must be remembered that section 15 (1) provides that the terms of the original contract shall apply only "so far as the same are con- "sistent with the provisions of this Act."]

Animus revertendi is only applicable where someone is occupying for the tenant: see *per* Lord Greene M.R. in *Brown* v. *Draper*[20] that it did not matter whether the real tenant intended to return so long as he was occupying by someone else. [*Errington* v. *Errington and Woods* [21] was also referred to.] So long as the manager is in the house the tenant's tenancy remains in existence.

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[12] Post, p. 326.

[13] [1934] 1 K.B. 57.

[14] [1948] W.N. 438; 64 T.L.R. 596.

[15] 65 T.L.R. 596, 598–9.

[16] [1952] 2 Q.B. 735; [1952] 2 T.L.R. 264; [1952] 2 All E.R. 420.

[17] [1952] 2 Q.B. 735, 737.

[18] [1952] 2 Q.B. 735.

[19] [1931] 2 K.B. 546.

[20] [1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246.

LORD GODDARD C.J. I will ask Denning L.J. to deliver the first judgment.

DENNING L.J. stated the facts, and continued: Paynter himself is only a licensee and has no protection against Hitchcock; but Hitchcock claims to be entitled to the protection of the Acts because he says that occupation by Paynter is equivalent to occupation by himself, and for this purpose he relies on the clause in the agreement which I have read.

In my opinion the principle on which this case should be decided was stated by Lord Wright in *Hiller* v. *United Dairies (London) Ld.*,[1] where he said [2]: "If the rights under the Acts "which are given to the statutory tenant are, as this court has "held in several cases, purely personal, I do not see how these "rights can be vicariously enjoyed or how the principle of dwelling "in the premises by an agent can be admitted." If Hitchcock were enabled by the clause in this agreement to claim the protection of the Acts, it would mean that a limited company by a like clause could obtain protection; and that would be contrary to the principle involved in *Hiller's* case.[2] So also, if Hitchcock could by the clause obtain the benefit of the Acts in respect of this house, he might do so in a similar way for half a dozen houses and he might be statutory tenant of half a dozen: and if he died and his widow succeeded, she might claim the statutory tenancy. Such consequences can never have been intended by Parliament; and I do not think that the clause in the agreement can be admitted to have such an effect. The clause is not carried over into the statutory tenancy because it is not consistent with the provisions of the Act. It is contrary to the principle that the tenant is only protected so long as he himself retains possession, which means so long as he himself remains in personal occupation.

Some reference was made to the husband and wife cases. It is well established that if a husband deserts his wife and leaves her in the house, the statutory tenancy does not come to an end. That is because of the particular relationship of husband and wife.

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[21] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

[1] [1934] 1 K.B. 57; 50 T.L.R. 50.

[2] [1934] 1 K.B. 57, 61.

The husband continues to occupy by his wife. She has an irrevocable authority from him to stay there. It remains the matrimonial home, though he is not living there. Those cases are on a special footing, and do not apply to this case.

Let me add a word of caution. I can well see that the court would not allow the landlord to avoid the Acts by taking someone as a nominal tenant, well knowing that the real tenant was to be somebody else. The court would then look to the realities of the situation. But subject to cases of that kind, the only person protected under the Rent Restriction Acts is the tenant; and he is protected only so long as it is his home. As Lord Goddard C.J. said in *Reidy* v. *Walker*,[3] "the Rent Restriction Acts were "intended for the protection of a person's home, not for the "protection of some other rights which he may have." This case seems to me to be an attempt to protect Hitchcock in respect of some other rights, certainly not a right in respect of his home. In my judgment, this appeal should be allowed.

Birkett L.J. I quite agree and in ordinary circumstances would be quite content to add nothing more. But we are differing from the county court judge and, as I feel a special responsibility to him in view of something he said in his judgment, I will add a few words.

I do not pretend that any of these cases under the Rent Restriction Acts are easy, and there were times when I was much attracted by the argument of Mr. de Piro. The county court judge in a very careful judgment cited certain county court cases which supported the view which he took in this case, and said that he did not know that any of those county court cases had been adversely criticized. He then relied on the decision in *Wabe* v. *Taylor*,[4] to which I was a party, and quoted from the judgment I then delivered. That was a husband and wife case, and I think it is commonly conceded that the husband and wife cases are in a rather special category. In *Wabe* v. *Taylor*[4] a deserted wife had remained in occupation of the house and had continued to pay rent to the landlord, although the rent book contained the husband's name. The facts in the case were very special and I summarized them in this way[5]: "In 1950 the plaintiff, the landlord, knew the facts. He "knew the wife was in possession. He knew the husband was

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[3] [1933] 2 K.B. 266, 272; 49 T.L.R. 386.

[4] [1952] 2 Q.B. 735; [1952] 2 T.L.R. 264; [1952] 2 All E.R. 420.

[5] [1952] 2 Q.B. 735, 741–2.

"then in Leicester. He had lived two doors away for most of "his life, and he knew the exact position when he bought the "premises. His wife, Mrs. Wabe, who collected the rents, gave "evidence that she said to the wife, 'What name shall I put "'on the rent book?' and the wife said, 'Mr. Taylor.' And "so Mr. Taylor's name appeared on the rent book. The defen- "dant paid the rent and fulfilled all the obligations for all that "time."

Somervell L.J., who delivered the leading judgment, said [6]: "I think the same conclusion might be arrived at by reason of "the fact that when the plaintiff bought he did so with full "knowledge of the position, namely, that the husband had "deserted, and he accepted the rent from the wife, the rent "book being in the husband's name. It might well be said he "accepted her occupancy as that of the tenant husband."

Hodson L.J. said [7]: "The husband's name was in the rent "book but the rent was always paid by the wife, and I think the "landlord has accepted the occupancy of the wife as that of the "husband throughout. On this ground also I think the judgment "of the county court judge can be sustained."

I said exactly the same thing, but what I did was to quote the passage from Mr. Megarry's book on the Rent Acts [8]: "'Such "'decisions present obvious theoretical difficulties.'" The difficulties, obvious though they be, arise in reconciling these decisions with the principle in *Skinner* v. *Geary*,[9] and all the cases which have followed since; the principle in *Skinner* v. *Geary* [9] and subsequent cases is that just stated by Denning L.J., namely, that the protection which the Acts afford is to the tenant in his own home. It is a personal thing, although that is, of course, not laid down in the Rent Restriction Acts. Since *Skinner* v. *Geary* [9] and the famous judgment of Scrutton L.J., it has never been doubted that that is the principle that runs through the Acts of Parliament. I therefore quoted this passage (Megarry, 6th ed., p. 155) [10]: "'Such decisions present obvious theoretical difficul- "'ties, but a satisfactory result can perhaps be supported (at all "'events between the original parties) on the ground that by "'their agreement the parties have made occupation by the "'daughters or the manager equivalent to personal occupation "'by the tenant.'"

It is scarcely necessary to say, but out of loyalty to the county court judge I ought to say, that I was quite manifestly citing that passage in support of the view which I and the other members of the court took, that on the facts of that case the landlord had accepted the deserted wife and her occupation as the occupation of the tenant.

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[6] [1952] 2 Q.B. 735, 739.
[7] Ibid. 743.
[8] Ibid. 740.
[9] [1931] 2 K.B. 546; 47 T.L.R. 597.
[10] [1952] 2 Q.B. 735, 740.

I can only regret that *Cove* v. *Flick*[11] in the Court of Appeal was not cited in full to the county court judge. It was not possible to do so, though Mr. de Piro, knowing of the case by having been present in court and having heard some of the argument, did mention the matter to the county court judge, who did not make any particular reference to it in the judgment. I think that it is clear from *Cove* v. *Flick*,[11] where *Wabe* v. *Taylor*[12] came under discussion, that Somervell L.J., who delivered the leading judgment, was saying, in effect[13]: "*Wabe* "v. *Taylor*[14] concerned a deserted wife and, so far as that is "concerned, her position was, therefore, a very special one and "cannot assist the defendant in this case." He proceeded on those lines and then added[15]: "Certainly I think what was said "in *Wabe* v. *Taylor*[16] ought not to be regarded as having any "general application beyond the facts of the case as there stated "in Birkett L.J.'s judgment."

Denning L.J. referred to the same matter in the judgment he delivered, and also referred to *Hiller* v. *United Dairies* (*London*) *Ld.*,[17] a case of a limited company and their manager. As I understand that case and the limited company cases, they proceeded on the footing that, having regard to the doctrine that the protection the Acts afford is personal, a limited company cannot come within it. As Goddard J. said, in effect[18]: "There "is not that element of domesticity"; and as Lord Wright said, in effect[19]: "They are outside the Act."

Then Romer L.J.,[20] in the same case, referring to the passage in Megarry, said that originally the word "perhaps" was in the passage but had been dropped in later editions, and he thought that it might be well if it was restored; meaning that, in his view at any rate, it was very doubtful whether the principle which in *Wabe* v. *Taylor*[21] was applied to a husband and wife could really be extended.

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[11] Post, p. 326.
[12] [1952] 2 Q.B. 735.
[13] Post, p. 327.
[14] [1952] 2 Q.B. 735.
[15] Post, p. 326.
[16] [1952] 2 Q.B. 735.
[17] [1934] 1 K.B. 57.
[18] [1933] 1 K.B. 266, 272; 49 T.L.R. 386.
[19] [1934] 1 K.B. 57, 60.
[20] Post, p. 326.
[21] [1952] 2 Q.B. 735.

The argument which has been put before us here is that this is the very case which Somervell L.J. spoke about when he said, in effect[22]: " We will decide that when it comes before us." It is perfectly plain that *Wabe* v. *Taylor*[23] decided that in the case of a husband and wife the occupancy of a wife can be regarded as the occupancy of the husband. Mr. de Piro says: " I want to " extend that and I want to say that in this particular case, having " regard to the clause in the agreement, the occupancy of Paynter " was the occupancy of the tenant." I am bound to say that, having regard to the decisions in *Skinner* v. *Geary*[24] and all the cases which have followed, it seems very difficult to make that extension without coming into conflict with those decisions, notably the judgment of Lord Wright which has been quoted above.

I agree that whenever there is a Rent Act point one may be certain that it will bristle with difficulties, and it is certain that as case law increases fresh difficulties arise as new and unexpected situations arise. I agree with the judgment which has just been delivered and with the conclusion which Denning L.J. announced.

LORD GODDARD C.J. I agree. In spite of a very forcible and well-sustained argument by Mr. De Piro, I think that the Acts are intended and designed to protect tenants and tenants only. That there has been an inroad into that principle in the cases of husband and wife is no doubt true. I cannot help thinking that in those cases the shadow of the old common law doctrine that husband and wife are one in law has possibly, consciously or unconsciously, affected the courts. The Acts put very considerable difficulties in the way of landlords and circumscribe their legal rights to a very great extent. I do not think that we ought by decisions to enlarge the difficulties of landlords or to go further than the declared object and policy of the Acts dictate—that is, to protect tenants—and I think that it cannot be denied that that means tenants who live in these houses. Where there is a personal tenant who does not live in the house, never intends to live in the house, and declares that his intention is never to live in it, I can see no reason why his tenancy should be protected to enable him to keep in the house a manager, or a partner, or anyone else whom it may be

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[22] Post, p. 326.

[23] [1952] 2 Q.B. 735.

[24] [1931] 2 K.B. 546.

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convenient to have there. For these reasons I should allow the appeal.

Appeal allowed.
Order for possession within two months.

Solicitors: *Berrymans for Allan Janes & Co., High Wycombe; Capel, Cure & Clarke, incorp. Willmett & Co.*

M. M. H.

NOTE.

C. A.

1953
Dec. 17.

Somervell, Denning and Romer L.JJ.

COVE *v.* FLICK.

Landlord and Tenant—Rent restriction—Personal occupation—Vicarious occupation—Tenant ceasing to occupy premises personally—Tenant's family remaining in occupation—Alleged oral agreement between tenant and landlord that family should occupy—Claim for possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

APPEAL from Judge Howard, sitting at Southend County Court.

The plaintiff let a house to the defendant tenant in 1938 for a year "and after the expiry of the said term from month to month until "determined by notice." At the time the tenant intended that the house should be a home for his father and mother, his sister, who was living apart from her husband, and himself, and they lived in the house until 1949, when the tenant married and went to live elsewhere. The rent continued to be paid and was accepted by the landlord, but on August 30, 1953, the landlord served on the tenant a notice to quit.

In the county court action the landlord claimed possession, contending that the tenant had ceased to occupy the premises. The tenant contended, first, that at the time the tenancy was created there was a conversation between himself and the landlord as a result of which it became a term of the tenancy agreement that the property should be occupied by persons other than the tenant himself, namely, his parents and his sister, and that the occupation of his family should be protected as if it were his own occupation, to the exclusion of the principle as to personal occupation by the tenant laid down in *Skinner* v. *Geary* *; and secondly, that he had the intention to return and had left furniture in the house, so that, on the facts, the principle in *Skinner* v. *Geary* * could not apply. The county court judge rejected those contentions and gave possession to the landlord. The tenant appealed.

John Gower for the tenant.
Brian Gibbens for the landlord.

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* [1931] 2 K.B. 546; 47 T.L.R. 597.

SOMERVELL L.J. stated the facts and the contentions of the parties in the county court and continued:

The judge referred to a statement in Mr. Megarry's book on the Rent Acts, 7th ed., p. 188, which, he said, was quoted with approval in this court in *Wabe* v. *Taylor*.[1] *Wabe* v. *Taylor* concerned a deserted wife and her position was, therefore, a very special one and cannot assist the defendant in the present case. But a point had been made in argument in that case based on the facts as stated in Birkett L.J.'s judgment. The facts were that at the time when the plaintiff landlord bought the reversion, the deserted wife was there and was paying the rent. According to the evidence, when the landlord's wife went to collect the rent she said to the deserted wife: "What name shall I put "in the rent book?" It would therefore appear that the landlord would have been quite willing to accept her as the tenant. But the deserted wife said: "Mr. Taylor." That was her husband. In those circumstances, we all thought that the claim might well have succeeded on the alternative ground that her occupancy had been accepted in those circumstances as the occupancy of her husband. Birkett L.J. referred to a discussion in Mr. Megarry's book (6th ed., p. 155) with regard to two county court cases, in neither of which was the tenant in occupation but in which there were at any rate grounds for saying that at the time when the tenancy was negotiated it was the basis of the tenancy that somebody other than the lessee should occupy. Mr. Megarry (7th ed., p. 188) concludes the discussion of these cases by saying: "Such decisions present obvious theoretical difficulties, but "the satisfactory results can be supported (at all events between the "original parties) on the ground that by their agreement the parties "have made occupation by the wife or daughters or manager equivalent "to personal occupation by the tenant."

I am not at all clear whether the parties can in fact do that. As Denning L.J. pointed out in the course of the argument, it may be difficult to reconcile that with the decision where a limited company was the defendant. Certainly I think what was said in *Wabe* v. *Taylor*[1] ought not to be regarded as having any general application beyond the facts of the case as there stated in Birkett L.J.'s judgment. The sort of case contemplated by Mr. Megarry in that sentence can be dealt with when it arises.

For these reasons it is clear that this point does not avail the tenant and that what he had said with regard to the family coming to live there, and the fact that they did go there, in no way prevents the landlord from relying on the principle of *Skinner* v. *Geary*,[2] if that principle is applicable to this case.

But the second point which is taken is that, because the tenant had the intention of returning and had left furniture there, that displaced the principle. With regard to that, he was in the neighbourhood and being a devoted son, he looked in almost every day on his father and mother. He said in his evidence that if either parent died he would have to go back to assist the surviving parent, and if his sister left home he would have to go back. It might appear from the judgment that he may have said that it was a house which in the future he would like to make his own home. I agree with the judge that those possibilities of returning are so contingent that they do not take the case out of the *Skinner* v. *Geary* [2] principle. That being so, the fact that he left some of his furniture does not help him to maintain that he should not be treated as a non-occupying tenant. I agree with the judgment and the reasons which the judge gave for his conclusion, and I would dismiss the appeal.

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[1] [1952] 2 Q.B. 735; [1952] 2 T.L.R. 264; [1952] 2 All E.R. 420.

[2] [1931] 2 K.B. 546; 47 T.L.R. 597.

DENNING L.J. The Rent Acts only protect occupying tenants and protect them only so long as they are in occupation. If a tenant should cease to occupy or should die, the members of his family cannot stay on in the house except in the special circumstances provided for by section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. For that reason it is often very important to inquire who is the legal tenant. For instance, after a father and mother are both dead, and a question arises whether the daughter can stay on, it is often important to decide whether the father or the mother was the tenant, or whether both were the tenants. That is a problem which continually arises. So far as a limited company is concerned, it has been held by Lord Wright in *Hiller* v. *United Dairies (London) Ld.* [3] that limited companies are incapable of having any Rent Act protection. He said [4]: "If the rights under the Acts "which are given to the statutory tenant are, as this court has held "in several cases, purely personal, I do not see how these rights can "be vicariously enjoyed or how the principle of dwelling in the premises "by an agent can be admitted." That principle is really sufficient to decide the first point in the present case.

As to the proposition which was stated in Mr. Megarry's book and quoted by Birkett L.J. in *Wabe* v. *Taylor*, [5] I can well see that the court would not allow a landlord to evade the Act by taking an absent member of the family as a nominal tenant when the real occupier and real tenant was to be a present member; but, subject to cases of that kind, it seems to me that the principle stated by Lord Wright is beyond question. I agree with all that my Lord has said on the other point also and that the appeal should be dismissed.

ROMER L.J. I also agree. I would only like to point out one thing. The passage in Mr. Megarry's book which was considered by Birkett L.J. in *Wabe* v. *Taylor* [5] in the 6th edition, at p. 155, which was the edition then current, said, after referring to certain cases and referring to occupation by daughters or by a manager of a business: "Such decisions "present obvious theoretical difficulties, but a satisfactory result can "perhaps be supported (at all events between the original parties) on "the ground that by their agreement the parties have made occupation "by the daughters or the manager equivalent to personal occupation by

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[2] [1931] 2 K.B. 546; 47 T.L.R. 597.

[3] [1934] 1 K.B. 57; 50 T.L.R. 20.

[4] [1934] 1 K.B. 57, 61.

[5] [1952] 2 Q.B. 735, 740.

"the tenant." I notice that in the 7th edition, at p. 188, the latest edition, the precautionary word "perhaps" has been dropped. I quite agree with what my brethren have said on the difficulty of the proposition, but at the moment I should like to see the word "perhaps" restored. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co. for Gregson & Golding, Southend-on-Sea; Gibson & Weldon for H. Maxwell Lewis, Southend-on-Sea.*

M. M. H.

REGINA *v.* ROBERTS.

1953
Mar. 23, 24.

Devlin J.

Criminal Law—Procedure—Fitness to plead—Accused found mute by visitation of God—Whether fit to plead—Whether issue of fitness can be tried by jury with general issue.

On the arraignment of a prisoner indicted for murder he stood mute, and a jury duly impanelled and sworn for the purpose found that he was mute by the visitation of God. Questions then arose whether the accused was fit to plead and whether that issue could be tried by the jury together with the general issue whether the accused was guilty or not guilty:—

Held, that the defence could not be compelled to choose between fighting the general issue or dealing with the issue of unfitness to plead, and, where the defence wished to challenge the prosecution's case on the general issue, the question whether the accused was fit to plead could be tried and determined by the jury together with the general issue, so that the right which would flow to the defence if the accused were found unfit to plead would be preserved.

Reg. v. *Berry* (1876) 1 Q.B.D. 447 applied.

TRIAL ON INDICTMENT.

At Cardiff Assizes the accused, George Roberts, was charged on an indictment with murder. On arraignment he stood mute; a jury was impanelled, and evidence (which was not contradicted) having been called by the defence to show that the accused was deaf and dumb from birth, he was found to be mute by the visitation of God. Counsel for the Crown submitted that the evidence so far called raised a presumption of idiotism, that prima facie the accused was unfit to plead, and incapable of following the proceedings, instructing the defence, or challenging

[Reported by HYWEL AP ROBERT, Esq., Barrister-at-Law.]

a juror; and that on the authorities those matters should be next tried. It was agreed by counsel that if the accused were found unfit to plead the judge must order his detention as a Broadmoor patient until Her Majesty's pleasure be made known.

Counsel for the defence submitted that there was no precedent for trying the matters referred to before the trial of the general issue on the application of the Crown, although the defence might so apply, and no presumption of idiotism arose. In reply to Devlin J. he intimated that there was a defence on the facts, and he wished the jury to try the general issue.

H. V. Lloyd-Jones Q.C. and *J. Jones Roberts* for the Crown. The accused being surdus et mutus a nativitate is prima facie unfit to plead. The jury should try, first, the issue whether he is fit to plead or no; secondly, if he is so fit, whether he can sufficiently understand the trial to make it proper to proceed. Medical evidence is available on the second question. It is admitted that if he is found unfit to plead an order must be made for his detention as a Broadmoor patient until Her Majesty's pleasure be made known. A deaf mute is incapable of guilt on a presumption of idiotism, and the trial of the facts cannot proceed unless that presumption is rebutted: *Rex* v. *Jones*,[1] *Rex* v. *Steel*.[2] If there is no certain mode of communicating the details of the trial to the prisoner, the jury ought to find him insane: Alderson B. in *Rex* v. *Pritchard*.[3] Both in that case and in *Rex* v. *Dyson* [4] (where Parke J. relied on the authority of Hale's Pleas of the Crown, vol. 1, p. 34), a deaf mute was found insane and ordered to be detained, as not capable of standing trial, though capable of pleading. The issue of sanity was tried before any evidence relating to the indictment was heard. In *Reg.* v. *Berry* [5] both the issue of fact and the issue of the prisoner's capacity to follow the proceedings were tried together. He was found guilty on the evidence, but incapable of understanding the proceedings. This was treated as a verdict of insanity and he was ordered to be detained.

It is submitted that the proper order of trying the issues was that followed in *Pritchard's* case [6] and not that in *Berry's* case,[7] where the Court of Crown Cases Reserved was considering the effect of the verdict, and not the order in which the issues should be tried. [*Rex* v. *Governor of H.M. Prison at Stafford, ex parte Emery*[8] was also referred to.]

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[1] (1773) 1 Leach 102.

[2] (1787) 1 Leach 451.

[3] (1836) 7 C. & P. 303.

[4] (1831) 7 C. & P. 305n.

[5] (1876) 1 Q.B.D. 447.

[6] 7 C. & P. 303.

[7] (1876) 1 Q.B.D. 447.

H. Edmund Davies Q.C., S. J. Havard Evans and *Hywel ap Robert* for the accused. It is for the defence to raise as preliminary issues the fitness of the accused to plead, and his capacity to follow the proceedings, and not for the prosecution to do so, at all events when the defence desires that the facts should be tried out. There is no precedent for the present application by the Crown. There is no presumption of idiocy against a deaf mute: Roscoe's Criminal Evidence, 16th ed., p. 126. The presumption is always in favour of sanity: *Harrod* v. *Harrod.*[9] The procedure adopted in *Berry's* case[10] was correct. The accused should be tried on the merits, and the question of capacity to follow the proceedings should be left to the jury when they are directed on the general issue. If the Crown's submission is well-founded, a man might be ordered to be detained as a Broadmoor patient though he was wholly unconnected with the crime. [*Reg.* v. *Turton*[11] and *Rex* v. *Christie*[12] were also referred to.]

DEVLIN J. In this case the accused has been found on the verdict of a jury to be mute by the visitation of God, and principle and authority directs that, unless there is some reason for taking some other course, that finding should be the basis of entering a plea of not guilty on behalf of the accused and the trial against him must proceed. But whether the accused is found mute of malice or mute by the visitation of God, a question often arises at the beginning of a trial whether he is fit to plead, and it has been clearly laid down by the authorities that, if it be established that a man's mind is such that he would be incapable of understanding the nature of the proceedings, he should not be put on his trial and convicted for the offence: such a conviction could not stand. It is clear from the authorities that it is not merely defects of the mind which may bring about that result. Defects of the senses, whether or not combined with some defect of the mind, may bring about that result, and the authorities are clear that, if there be no certain means of communication with the accused so that there is no means of making sure that he will follow as much of the proceedings at

[8] [1909] 2 K.B. 81; 25 T.L.R. 440.

[9] (1854) 1 K. & J. 4.

[10] (1876) 1 Q.B.D. 447.

[11] (1854) 6 Cox C.C. 385.

[12] [1914] A.C. 545; 30 T.L.R. 471; 10 Cr.App.R. 141.

his trial as it is necessary that he should follow, then he should be found unfit to plead.

In this case, the prisoner being mute by the visitation of God, counsel on both sides are agreed, broadly speaking, that there is no certain means of communicating to the accused the procedure which takes place at this trial, and the question which has arisen is whether that is a matter which has to be determined by the jury at once, the jury being specially sworn for that purpose, or whether, in effect, it can be tried and determined by the jury together with the trial and determination of the general issue whether the accused be guilty or not guilty. Counsel for the defence wishes that general issue to be tried. He has not disclosed, as he is not bound to do and as, indeed, he should not do, the nature of his defence. It may well be that the defence is that the prosecution witnesses do not make out a prima facie case; or it may be that the defence have at their disposal other witnesses, not yet called, who, if believed, would destroy the case which the prosecution would otherwise have made out. Whatever it be, it is a perfectly conceivable situation, although it appears never to have arisen in practice before, that counsel for the defence, although he cannot be instructed by the accused, may say: "I do not think that the prosecution can "bring any case against this accused man at all. If they can, "then of course I am in no position to defend it with his aid "because he cannot instruct me and cannot tell his story. But "as the prosecution can make out no case, I am not prepared "to let the matter go merely on the issue whether he is fit or "unfit to plead."

If that issue alone be tried, and a verdict be returned by the jury that he is unfit to plead, the court has no power except to make one order, namely, that he should be detained as a criminal lunatic, or Broadmoor patient as it is now called, until Her Majesty's pleasure be made known; that means, of course, for an indefinite period. Counsel for the defence cannot be forced to accept that course for his client if, on a true view of the facts, he is of the opinion that he can properly obtain for his client a verdict of not guilty. Nor can he be forced to elect. He must be entitled to retain his rights to say that the accused is not in a position to instruct him and therefore he cannot put the accused in the witness-box to tell his own story. He cannot be forced to say to himself: "Shall I play for safety and obtain a verdict "whereby this man is detained as a criminal lunatic, or shall I, "in effect, gamble on the chance of my being able to get him off "altogether, with the knowledge that if my gamble fails he will "be convicted of murder, and there is only one sentence which "the court can pass."

Although, therefore, this seems to be a position which has never arisen before, and counsel have told me that they have found no authority on the matter, there cannot be any doctrine in a criminal case which compels counsel to elect. There must, in my view, be a procedure which would enable counsel for the defence to have the advantage of taking both points, and if there were no such procedure I think that it would be necessary to invent it, because to insist on the issue of fitness to plead being tried might result in the grave injustice of detaining as a criminal lunatic a man who was quite innocent; indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime—whether he was or was not—and investigations which might have led to the apprehension of the true criminal would not take place.

So far from there being any authority which would compel me to require that procedure to be adopted, I think that the authorities indicate that there is a procedure which can properly be followed in a case of this kind. The earlier authorities are all concerned with the principles on which a jury should be charged. I have not investigated them, but counsel for the defence told me, without contradiction, that in each of the earlier authorities the points had been taken by the defence; it may very well be that the defence had no answer to a prima facie case, and no ground on which to urge that the law should not take its course, except the ground that the accused would be incapable of understanding the proceedings at the trial and incapable, therefore, of putting up any defence. But in *Reg.* v. *Berry* [1] a different course was followed. Whether it was followed designedly or not, or whether it was followed because it was thought desirable that there should be some inquiry into the general issue, I do not know. But it is plain that, although the question arose whether or not the accused was fit to plead, it was not submitted to the jury until the prosecution had proved their case. When it was submitted to them, the jury were asked for a special verdict in conjunction with the general issue. In that case the jury had been sworn to ascertain whether the prisoner stood mute of malice or by the visitation of God, and they found that the prisoner was mute by the visitation of God. The trial then proceeded because there was present a man who, apparently, was thought to be able to communicate with the prisoner by means of signs. The chairman of quarter sessions then put two questions to the jury: first, whether they found the prisoner guilty or not guilty on the indictment, and, secondly, whether in their opinion the prisoner was capable of understanding, and had in fact understood, the nature of the proceedings. The verdict of the jury was: "We find the prisoner guilty on the evidence; "and we also find that he is not capable of understanding, and, "as a fact, has not understood the nature of the proceedings."

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[1] (1876) 1 Q.B.D. 447.

A case was stated, and the Court of Crown Cases Reserved found on that evidence that the accused could not be convicted, although the jury had found him guilty; they also found that he was not capable of understanding and had not as a fact understood the nature of the proceedings, and, on that verdict, the court held that the proper course was that he should be detained under the Criminal Lunatics Act, 1800, as the finding of the jury amounted in point of law to a finding of insanity. I think that this is the first reported case in which the two issues, the general issue and the issue of fitness to plead, were put before a jury together, and it is significant that there is nothing to be found in the judgments in *Reg.* v. *Berry* [1] which expresses or implies the slightest criticism of that procedure. In the course of the argument Kelly C.B. said [2]: "But here the jury have "found also that the prisoner was incapable of understanding "what passed at the trial, and can it be contended that he "might, under such circumstances, be convicted? The question "which ought to have been put to the jury in *Steel's* case [3] was "properly put in the present one." Although the Chief Baron was not dealing in terms with the time when the question was put, it would be a curious observation to make if his view was that, although the question was properly put, the procedure by which it was put was entirely wrong and the issue ought to have been tried earlier and separately. The court treated the verdict of the jury so returned as a faulty verdict because, on the question being raised whether there was any authority for detaining the accused as an insane person Kelly C.B. relied on the finding of the jury as justifying that course, because he said that it amounted in point of law to a finding of insanity.

That case, and all the earlier cases of any importance, were considered by a Divisional Court in *Rex* v. *Governor of His*

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[1] (1876) 1 Q.B.D. 447.

[2] Ibid. 449.

[3] (1787) 1 Leach 451.

Majesty's Prison at Stafford, ex parte Emery.[4] That was a case where an accused person who had been found by a jury to be unfit to plead was detained under the Criminal Lunatics Act, 1800, and the validity of his detention was challenged by a writ of habeas corpus, the question which the court had to determine being whether deafness and inability to read and write and, so, to be communicated with, was equivalent, for the purposes of the wording of the Act, to a finding of insanity, and they held that it was. But in the course of that case the judges reviewed all the earlier authorities and, in particular, *Rex* v. *Steel*,[5] *Rex* v. *Pritchard*,[6] and *Rex* v. *Dyson*,[7] where the issue had been put to the jury without the general issue being tried, and then referred to *Reg.* v. *Berry*.[8] Lord Alverstone C.J. recited the facts of *Reg.* v. *Berry* [8] without any criticism of the procedure which had been followed, and at the end of his judgment he followed all the decisions in these terms [9]: "That is a decision" (that is, *Reg.* v. *Berry* [8]) "which approved of and adopted the "view of the law taken by Parke J and Alderson B. years before; "and, following and adopting those decisions, I think that "Channell J. in the present case laid down the right test of "insanity for the purpose of the Act of 1800 and rightly made "an order for the prisoner's detention during His Majesty's "pleasure." That shows that the view taken by Lord Alverstone C.J. was that all these authorities were laying down one doctrine; the difference between them, the time when the verdict was taken, being, in my view, only a difference of procedure.

In cases where the defence does not propose to challenge that the prosecution has a prima facie case, and has no evidence which might induce a jury to reject the evidence for the prosecution, then the convenient course is to let the issue of fitness to plead be tried at once. I can find no authority in these cases which would prevent counsel for the defence, who wishes to test the prosecution's case on the general issue, from having the right to do so and at the same time preserving all those rights which flow to the defence from the fact that the accused is a person, if it be so established, who is incapable of being communicated with or instructing counsel for his own defence. Were it otherwise, I think that the gravest mischief and injustice might follow. As I said earlier in the argument, the defence might wish to tender a witness who could prove that the accused was ten miles away at the time of the alleged crime. It cannot, I think, be our law that, by some formality of procedure, the defence should be prevented from laying matters of that sort before the jury, and so achieving, if they can, for their client a verdict of not guilty.

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[4] [1909] 2 K.B. 81.
[5] 1 Leach 451.
[6] (1836) 7 C. & P. 303.
[7] (1831) 7 C. & P. 305n.
[8] 1 Q.B.D. 447.
[9] [1909] 2 K.B. 81, 87.

In the course of giving this ruling I have not concerned myself with the question whether the burden is on the prosecution or the defence to establish unfitness to plead. That is a mere matter of presumption one way or the other. The issue here is the fundamental one, not whether the prosecution or the defence should first take the point, but whether the position of the defence is such that counsel has to choose between fighting the general issue or dealing with the issue of unfitness to plead. On that fundamental question I think that the submission made to me by counsel for the defence is the right one. Consequently I shall not now swear the jury to try separately the question whether the accused is fit to plead. They will be sworn merely to try the general issue.

Solicitors: *Director of Public Prosecutions; Myer Cohen & Co., Cardiff.*

1954
Feb. 18, 19;
Mar. 5.

Hilbery J.

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* TRUSTEE OF THE PROPERTY OF SOKOLOW (A BANKRUPT).

[1952 C. 5927.]

Revenue—Customs and Excise—Limitation of action—Seizure of prohibited goods—Action for forfeiture and condemnation of goods—Whether "a suit for any offence against the Customs Acts"—Action for penalty—Customs Consolidation Act, 1876 (39 *&* 40 *Vict.* c. 36), *s.* 257*—Exchange Control Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 14), *ss.* 21, 34 *and Sch. V.*

Limitation of Action—"Suit for any offence"—"Forfeiture."

Section 257 of the Customs Laws Consolidation Act, 1876, provides that "All suits indictments or informations brought or exhibited "for any offence against the Customs Acts in any court . . . shall "be brought or exhibited within three years next after the date of "the offence committed."

Before March 31, 1949, certain securities, being goods the import of which was prohibited by section 21 of the Exchange Control Act,

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[Reported by LESLIE CRAYMER, Esq., Barrister-at-Law.]

1947, were brought into the United Kingdom and became liable to forfeiture by virtue of section 177 of the Customs Laws Consolidation Act, 1876, which applied to them. In August, 1952, the Commissioners of Customs and Excise seized them and gave statutory notice of such seizure to the owner's trustee in bankruptcy who claimed the return of the securities. In proceedings brought by the Commissioners under section 207 of the Act of 1876 for the "forfeiture and condemnation" of the securities:—

Held, that section 257 applied only to criminal proceedings; that the action was solely one to determine the legality of the seizure and was not a suit "for any offence against the Customs Acts" within the meaning of section 257; and that accordingly the action was not barred by the limitation of time prescribed in section 257.

The word "forfeiture" is used in the Customs Consolidation Act, 1876, to connote two distinct and different things: on the one hand it is used in relation to the articles confiscated, and on the other it is used for the penalties incurred in consequence of an offence against the Customs Acts. When section 257 speaks of "suit "for any offence" it may be intended to cover a suit for a penalty which by the Act results from the committing of the offence.

ACTION.

Between January 1 and March 31, 1949, a number of assorted securities or certificates of title to securities were imported into the United Kingdom, without the permission of the Treasury, and were delivered to one Leon Sokolow. On or about March 31, 1949, Sokolow deposited the documents with Martins Bank Ld. in London. The importation was prohibited by section 21 of the Exchange Control Act, 1947. By virtue of section 34 of the Act of 1947, and of the Fifth Schedule thereto the enactments relating to customs were made applicable to these documents. Amongst such enactments section 177 of the Customs Consolidation Act, 1876, provides for the forfeiture of prohibited goods imported into the United Kingdom; and the plaintiffs, the Commissioners of Customs and Excise, seized the documents by virtue of powers given by that section.

On August 18, 1952, the plaintiffs, as required by section 207 of the Act of 1876, gave notice in writing of the seizure to Sokolow. The latter had been adjudicated bankrupt on February 1, 1951, and the defendant, as his trustee in bankruptcy, gave notice by a letter dated September 5, 1952, to the plaintiffs that he claimed the securities or certificates of title. After such notice of claim section 207 required that "proceedings shall be taken for the "forfeiture and condemnation" of the goods "either by informa-"tion filed in the . . . High Court of Justice in England on the "Revenue side, or exhibited before any justice of the peace."

By his defence to those proceedings the defendant alleged that the action was a suit within the meaning of section 257 [1] of the Customs Consolidation Act, 1876, and should have been brought within three years next after the date of the unlawful importation.

J. P. Ashworth for the plaintiffs. The writ having been issued more than three years after the securities were imported, the only issue is whether the proceedings are statute-barred. The defendant relies on section 257 of the Customs Consolidation Act, 1876, as limiting the Commissioners' right of action to three years. For the purposes of construing this section it is necessary to look at earlier provisions of the Act. Section 177 lays down that if dutiable goods are imported without payment of duty or if prohibited goods are imported they shall be forfeited, subject, of course, to the provisions of section 207. Further, section 202 provides that vehicles or vessels used to import or convey uncustomed or prohibited goods shall be forfeited and may be seized by authorized persons. It is significant that in neither of these two important sections is there any time limit imposed for either seizure or forfeiture. The only time factor throughout this part of the Act is the one month found in section 207, which provides that when goods are seized the officer shall give notice to the master or owner and the goods shall be forfeited unless within one month the master or owner shall give notice of claim, " . . . " whereupon proceedings shall be taken for the forfeiture and " condemnation. . . ." The word " whereupon " has been held, in an unreported case in Northern Ireland, to signify that there is no time limit for those proceedings.

The word " forfeiture " is used with two different meanings in the Act; sometimes it is used in a factual sense and means divesting an owner of his title to goods, and sometimes it is used in a pecuniary sense and means a penalty imposed for a breach of the criminal law. Instances of " forfeit " used in this pecuniary sense are found in sections 201, 203 and 235. Also in sections 223 and 224 " forfeiture " is used as if it is a penalty; and it would seem that in criminal proceedings under the Customs Acts the information must be exhibited within three years from the offence. But in section 226 " forfeiture " is used in the other sense, that of confiscating goods.

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[1] Customs Consolidation Act, 1876, s. 257: " All suits indictments or in" formations brought or exhibited for " any offence against the Customs " Acts in any court or before any " justice, shall be brought or exhibited " within three years next after the " date of the offence committed."

In *De Keyser* v. *British Railway Traffic and Electric Co. Ld.*[2] Lord Hewart C.J. said: " Where certain events have happened " the property in question is labelled ' forfeited ' under section 202. " There may be, where the owner of the property, or other person " authorized by him, gives notice of a claim, an inchoate forfeiture " which is to be completed by the combined forfeiture and condemnation contemplated by section 226. What is it that is open " to the claimant in such proceedings? In my opinion, nothing " more is open to him than to contend, and, if need be, to offer " evidence to prove that on a true view of the facts the conveyance " in question does not come within the class of things which by " section 202, are forfeited. . . . There is no opportunity for " mercy with regard to a conveyance which has been forfeited." That exactly fits this case. The object is labelled " forfeited "; if the owner makes a claim the forfeiture is inchoate until condemnation by the process laid down in the Act.

By their language and their settings sections 255 to 258 relate only to criminal prosecutions and have no application to the proceedings in this case. The limitation period in section 257 is in line with the three years mentioned in section 224 as both sections refer to criminal proceedings only. The appropriate procedure in the case of a civil action for forfeiture had already been laid down in section 207, which stated that after seizure a claim might be made by the owner, " whereupon proceedings shall be taken for " the forfeiture and condemnation. . . ." " Whereupon " indicates that there is no time limit, yet if section 257 applies proceedings cannot be taken after three years. The answer must be that section 257 was not intended to apply to such proceedings. Clearly, on principle, there should be no time limit for this type of action, for otherwise prohibited goods could be smuggled into this country and hidden for say three years before the Customs authorities discovered and seized them. The authorities would then give notice of seizure to the owner who could serve his notice of claim within a month, and then, if section 257 applies, the authorities would be out of time, since the date of the offence is the date of importation, and would have to return the prohibited goods to the owner. Ex hypothesi that section does not apply to this procedure to complete an inchoate forfeiture.

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[2] [1936] 1 K.B. 224, 230; 52 T.L.R. 73.

The Act clearly contemplates two types of proceeding, the outcome of both being forfeiture, the one for a criminal offence and the other of a civil nature. In section 186, which sets out a number of criminal offences which may be committed, guilty knowledge or an intent to defraud the Revenue is a necessary element of all the offences, and one of the penalties is "forfeiture" of treble the value of the goods or £100. But by contrast section 202 lays down that all ships, boats and carriages in which smuggled goods are carried shall be forfeited. Such a vehicle or vessel may be subject to forfeiture without any guilty knowledge on the part of the owner—as occurred in *De Keyser's* case [3]—and therefore it seems the more likely that proceedings for such a confiscation would be civil rather than criminal in their nature.

[Hilbery J. If, as you say, section 257 applies only to criminal proceedings, what "suit" could be brought for an offence? "Suit" is an odd word to apply to a criminal prosecution.]

It is submitted that the section refers to indictments for any offences or suits for the recovery of penalties, e.g., under sections 186, 187, 188 and 190.

[Hilbery J. I am also rather troubled by the last line of section 186, " . . . and the offender may be detained or proceeded "against by summons." Does that mean that a customs officer has power to detain someone indefinitely without summoning him and without a warrant?]

That would appear to mean while awaiting proceedings.

It would be fair to describe proceedings for treble value under section 186 as "a suit for an offence." Per contra, proceedings under section 202 against owners who have not committed any offence are not a "suit brought for an offence," and section 257 would not apply. There was no evidence that Sokolow had committed an offence and he was never prosecuted.

When Parliament intended to lay down a time limit for the recovery of a revenue penalty or for the condemnation of goods under the Inland Revenue Regulation Act, 1890, s. 22 (2), it was done expressly. Had Parliament intended to impose a time limit for condemnation proceedings under the Customs Consolidation Act it would have said so specifically. The Excise Transfer Order, S.R. & O. 1909, No. 197, Art. 25, applies section 257 to excise condemnation, but leaves untouched proceedings for condemnation of goods under the Customs Act. If the legislature had intended to impose a uniform practice for customs and excise condemnation and for condemnation under the inland revenue provisions one might have expected a provision similar to that in section 22 (2) of the Inland Revenue Regulation Act, 1890, made applicable to customs condemnation, but there is no such rule. Section 22 (2) of the Inland Revenue Regulation Act, 1890, expressly mentions proceedings for the condemnation of goods, section 257 of the Act of 1876 does not.

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[3] [1936] 1 K.B. 224.

The Limitation Act, 1939, states in section 30: "Provided "that this Act shall not apply . . . to any forfeiture proceedings "under the Customs Acts." But section 32 of the Limitation Act says: "This Act shall not apply to any action or arbitration "for which a period of limitation is prescribed by any other enactment . . ." The proviso to subsection (1) of section 30 goes the length of excluding expressly forfeiture proceedings which would have been excluded from the operation of the Limitation Act by the general provision of section 32.

F. H. Lawton for the defendant. These proceedings are a suit for an offence under the Customs Consolidation Act, 1876; a great deal must depend on the meaning of "suit" in section 257. The word was more commonly used in 1876 than it is today; actions were brought then in the Queen's Bench Division and suits in Chancery. The Exchequer courts had originally dealt with suits brought on revenue matters, and the Crown Suits Act, 1865, regulated procedure for the Revenue side of Exchequer. That Act says in section 6: "The term suit or cause means a "suit or cause commenced by information and except as "expressly provided otherwise, nothing in this Part of this Act "shall be deemed to apply to any proceedings other than proceedings commenced by information." This referred to an information used in equity proceedings. It is clear that, in 1876 at any rate, the term "suit" had the connotation of something by way of civil proceedings. Section 257 of the Act of 1876 contemplated civil proceedings under that Act as well as criminal proceedings and so the words ". . . for an offence . . ." are really inappropriate and should not be understood as limiting the meaning of the word "suits." In the earlier parts of the Act, section 247 is concerned with suits, prosecutions or informations for the recovery of penalties, while section 218 deals with the procedure for recovering penalties, enforcing forfeitures and punishing offenders. But section 257 is an omnibus section dealing with all suits, i.e., all suits which may be brought under this Act both civil and criminal in nature. If section 257 covers all suits, then prima facie it applies to the present suit. The more restrictive words " suits for the recovery of penalties " are not to be found in section 257. " All suits " must mean something more than mere suits for the recovery of penalties.

The basis of this case is that an offence has been committed; had there not been an offence by some person of unlawfully importing the securities there could have been no seizure and these proceedings would not have been brought. Therefore this is a " suit for an offence," and if there is a doubt as to the meaning of that phrase it should be resolved in favour of the subject. The subject is also entitled to the benefit of the time bar, if the Act can possibly be interpreted in his favour, to prevent a forfeiture.

Cur. adv. vult.

HILBERY J. The question for determination in this case is whether the plaintiffs' claim for condemnation of the securities particularized in the schedule to the statement of claim is barred by the provisions of section 257 of the Customs Laws Consolidation Act, 1876. [His Lordship read the section and continued:] The defendant contends, in short, that the words " All suits," the opening words of this section, must be interpreted to mean all such suits as can be brought under the Act in which those words are used, that is, the Act of 1876.

He further contends that the word " suit " at the time of the Act of 1876 had a civil connotation (see the Crown Suits Act, 1865), and therefore, that in using that word in this section, Parliament intended to cover civil proceedings, and the section was therefore not intended to be confined to criminal processes. Furthermore, he has urged that if the word " suits " in the section is prima facie to be given this meaning, then the words " for an " offence " are inappropriate unless interpreted as meaning all proceedings in respect of offences. The question, therefore, becomes one of construction. The section must be interpreted in the context of the whole Act, and in the context of the particular four sections which are grouped together in the Act under a special sub-heading, of which the section in question is one.

It is convenient to consider the section in question first in its place in this subsidiary group of four sections, and then to see if the construction put upon it, when so considered, is consonant with, or in any way inconsistent with, other provisions of the Act. The section is one of four, numbered 255 to 258 inclusive. These four are grouped under the following heading: "As to prosecution by indictment or information." Section 255 enacts in whose names indictments or suits are to be preferred; section 256 gives power to the senior law officers of the Crown in England, Scotland or Ireland, by entering a nolle prosequi or otherwise, to stop any prosecution for recovery of any fine, penalty or forfeiture; section 257 is in the terms already quoted; section 258 provides the venue for the trial of any indictment, prosecution or information instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts.

It is to be observed that these sections are grouped under a heading which indicates that they are intended to relate to prosecutions by indictments or informations, that is to say, to criminal proceedings; the sections are concerned with the persons in whose name proceedings are to be begun, how in certain circumstances they can be stopped, where, if tried, they are to be tried, and the time within which they must be begun.

Section 257 is therefore one of a special group providing for certain particular matters in connexion with criminal proceedings. Furthermore, in so far as section 257 is expressed to relate to indictments or informations in any court or before any justice, it is confined to criminal proceedings; more especially as, if the section is to apply, the indictment or information must be for an offence against the Customs Acts. As one of the groups under a subheading apparently intended to indicate the subject to which the group coming under it relates, or taken by itself, section 257 would seem to apply only to criminal proceedings. All the forms of proceedings there enumerated are qualified by the words "for any "offence against the Customs Acts."

If that is right, the section in question has no application in the case under consideration unless the case is within the words of the section as a suit for an offence against the Customs Acts. It certainly is not an indictment or information. In my view it is not a suit for an offence against the Acts. It is a claim to have certain articles which have been seized condemned by the court. In the language of Lord Hewart C.J. in *De Keyser* v. *British Railway Traffic and Electric Co.*,[1] it is an action to complete what was an inchoate forfeiture by the combination of forfeiture and condemnation. In this connexion it is important to remember the provisions of the Act under which the as I have already pointed out, to stop by nolle prosequi any prosecution for recovery of any fine, penalty or forfeiture, and is undeniably applicable only to criminal proceedings. Nolle prosequi as a method of stopping proceedings is appropriate only in criminal proceedings. The forfeiture there spoken of would seem therefore to refer to a money penalty specified by the Act as the consequences of a crime committed against the Act, such as the treble value or £100 forfeiture under section 186.

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[1] [1936] 1 K.B. 224, 230; 52 T.L.R. 73.

When, therefore, section 257 speaks of suits for any offence, it may be intended to cover a suit for a penalty which by the Act results from the committing of the offence. Such a suit may perhaps be said to be "for an offence"; but, seeing that in the sections constituting the code of procedure to which I have already drawn attention, a distinction is drawn between proceedings for an offence and suits to determine the liability to forfeiture of goods seized, I am the more convinced that when the expression "suits for an offence" is used in section 257 it is not intended to refer to such a suit as the present, where the legality of a seizure already effected is the sole issue to be determined.

In addition, one cannot overlook the fact that there is good reason why the framers of section 257 should have intended to confine the period of limitation imposed by the section to proceedings of one sort or another for an offence, and not to proceedings for the condemnation of goods seized which have been claimed. Dutiable goods smuggled into the country or goods imported, the import of which is forbidden, can be seized when found. No limit of time is anywhere imposed by the Act within which, if such goods have been brought into the country, they must be seized. Valuable goods such as the securities in question in this action, the import of which is prohibited, might be hidden for more than three years and be increasing in value during that time; and if it were intended that they should none the less be immune from seizure after three years from the date when they were imported, one would expect the Act to make this so plain as to be beyond question, and certainly not to leave it a nice question of construction.

For these reasons I am of opinion that section 257 does not bear on the claim for condemnation made in this action. I therefore adjudge and declare that the securities or certificates of title seized by the plaintiffs, particulars of which are set out in the Schedule A to the statement of claim, are forfeited under and by virtue of the Exchange Control Act, 1947, and the

Customs Consolidation Act, 1876, and I order that the said securities or certificates be and are hereby condemned.

Judgment for plaintiffs.

Solicitors: *Solicitor for Customs and Excise; Nordon & Co.*

PEACOCK *v.* AMUSEMENT EQUIPMENT CO. LD.

[1953 P. No. 1976.]

C. A.

1954
July 6.

Somervell, Birkett and Romer L.JJ.

Fatal Accidents Acts — Damages — Voluntary payment — Claim by widower as dependant of deceased wife—Receipt of voluntary payment from beneficiaries of deceased's estate—Whether payment to be brought into account in calculating damages—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93), *s.* 2.

As a result of an accident occurring while she was a passenger on a miniature railway owned by the defendants the plaintiff's wife sustained injuries which caused her death. The defendants admitted liability and the plaintiff claimed damages as a dependant under the Fatal Accidents Acts, 1846–1908. The wife's estate consisted of a grocery shop with living accommodation attached, in which she and the plaintiff resided. By her will she left the property to a son and married daughter by a previous marriage, who after administration sold the business and voluntarily paid to the plaintiff a sum representing approximately one-third of the value of the estate:—

Held, that, since at the time of the gift the money was no longer part of the wife's estate but had become the property of the step-children, and it was not a payment made in consequence of the wife's death, but as the result of the step-children's generosity or affection, nor was it a benefit of which the plaintiff had any expectation as a result of the wife's death, it should not be brought into account in assessing damages.

Decision of Parker J. [1954] 1 W.L.R. 803; [1954] 2 All E.R. 123 reversed.

APPEAL from Parker J.

In 1940 the plaintiff, a tool supervisor, married a widow with two children. From that time until 1950 the family occupied a house bought by the wife in her own name on mortgage. During that period the plaintiff contributed a substantial part of his salary of £8 a week towards the upkeep of the home and the various steps in this matter were taken by the customs officials. It is conceded that the securities in question were "goods" the import of which was prohibited and which, when brought into this country, became forfeited goods under section 177. Being goods liable to forfeiture, section 202 applied, and by its express terms customs and excise officers and other specified persons were empowered to seize them. This they did, and having done so, section 207 came into operation, and they were obliged to give notice in writing of such seizure and of the grounds thereof to the master or owner of the things seized.

Section 207 provides that unless within one month from the date of such seizure the master or owner or some person authorized by him gives notice in writing that he claims or intends to claim the things so seized, the seizures made shall be condemned and taken to be condemned and may be sold. In such circumstances no suit for condemnation by the court is necessary, because the forfeiture which was inchoate at the time of the seizure is completed by a condemnation which follows by operation of law, and the Commissioners of Customs are empowered to sell the goods and to pass a statutory title to them. If, on the other hand, within one calendar month of seizure notice in writing is given by the person from whom such seizure is made, or by the master or owner of the things seized, or by some person authorized on his behalf, that he claims the things so seized or intends to claim them, the section enacts that thereupon proceedings shall be taken for the forfeiture and condemnation of the goods either by information filed in the Exchequer Division of the High Court of Justice on the Revenue side or exhibited before any justice of the peace.

It is because of that last mandatory provision that this action is brought. In such circumstances is such an action a suit for an offence under the Customs Act? In my view it is not. It is a suit to determine the legality of the seizure. It may be true that the fact that the goods were goods the import of which was restricted or forbidden and that they were seized are matters which must be proved unless, as in this case, they are admitted; but the proceedings are not for the offence which led to the seizure; they are proceedings to establish that the seizure which followed the offence has resulted in the Customs authorities having a good title to the goods, and therefore one which they could pass to a purchaser of the goods from them.

When considering the use of the word "forfeiture" in the phrase "proceedings shall be taken for the forfeiture and condemnation of the goods," regard must be had to the fact that this word "forfeiture" is used in the Act to connote two distinct and different things. The word "forfeiture" is used in the Act for both the articles confiscated and for many penalties incurred in consequence of the doing of something which the Act prohibits. Under section 177, if any prohibited goods shall be imported or brought into any part of the United Kingdom, then such goods shall be forfeited. Under section 186 every person smuggling prohibited goods or goods liable to duty or dealing with such goods with intent to defraud Her Majesty of the duty or to evade the prohibition "shall for each such offence forfeit either treble the "value of the goods including the duty payable thereon or £100 "at the election of the Commissioners of Customs." The side-note against these last words is "penalty treble value or £100." The forfeiture of treble value or £100 there spoken of is a penalty for the offence.

Sections 218 to 242, which are grouped under the sub-title "As to the course of procedure for recovering penalties, enforcing "forfeitures, and punishing offenders under the Customs Acts," constitute a complete code of procedure. Section 218 begins by providing that "All duties, penalties, and forfeitures incurred "under or imposed by the Customs Acts, etc." Having regard to what I have pointed out, is the use in the Act of the word "forfeiture" to mean a money penalty? I am of opinion that in this section, when it speaks of duties, penalties, and forfeitures it is forfeiture in this sense that is intended. Inasmuch, however, as seizure of goods is also spoken of as a forfeiture, but the liability to that forfeiture can be challenged under section 207 and thereupon the proceedings must be taken for the forfeiture and condemnation of the goods either by information filed in the Exchequer Division of the High Court on the Revenue side or exhibited before any justice of the peace, section 218 expressly also provides for how the liability to forfeiture of any goods seized under the authority of the Customs Act may be sued for in the High Court or proceeded for before a justice of the peace.

Throughout these sections there runs a distinction between information for an offence and the proceedings to establish the liability to forfeiture of goods seized. Section 223 begins: "All "informations exhibited before any justice for any offence com"mitted against or forfeiture incurred under this or any other Act "relating to the Customs." Clearly, the forfeiture there intended is the penalty incurred for an offence. Section 256 gives power, living expenses of the family. In 1950 the two children left the home, the house was sold, and a grocery business was bought with the proceeds, some £1,750, the wife managing the business. Thereafter the plaintiff and his wife resided in living accommodation attached to the shop premises, and the plaintiff ceased to contribute towards his living expenses, which were met by the wife out of the profits of the business.

On August 10, 1952, the plaintiff's wife met with an accident while a passenger on a miniature railway at Alexandra Park, owned by the defendants, and sustained injuries which resulted in her death. By her will she left her estate, consisting of the shop, to her two children, who, after administration, sold the business, and the plaintiff found accommodation elsewhere at a cost of £3 a week for board and lodging. After the sale of the business the deceased's son and daughter voluntarily paid over to the plaintiff the sum of £575, representing one-third of the wife's estate.

On a claim by the plaintiff as a dependant under the Fatal Accidents Acts, the defendants admitted liability, but contended, and were upheld in that respect by the trial judge, that the voluntary payment was part of the wife's estate, received by the plaintiff as a result of her death, and must be brought into account in calculating damages.

The plaintiff appealed.

Patrick O'Connor for the plaintiff. The judge was wrong in holding that the sum given by the stepchildren to the plaintiff was part of the wife's estate and was received by him as a result of the wife's death, and was therefore properly to be taken into account in calculating damages. The court can only take into account money received by a dependant as a result of the death. That is shown by the insurance and pension cases, and particularly by the State service pension cases; the payment of such pensions being a direct result of the death. There was here no expectation by the plaintiff of the receipt of the money. It was a gift by the stepchildren out of their own money as a mark of affection.

[Birkett L.J. May we not, on the facts, eliminate the question of reasonable expectation? Is not the question here whether this money came to the plaintiff by reason of the death of the wife?]

Yes, and it is submitted that it did not. The money at the time of the gift was no longer the property of the wife. The estate had been administered, the property had been realized, and the money belonged to the stepchildren, who made a voluntary gift to the plaintiff out of it. It has never been contemplated that a gift of that nature should be taken into account in assessing damages. [*Baker* v. *Dalgleish Steam Shipping Co.*[1]; *Redpath* v. *Belfast and County Down Railway*[2]; *Pym* v. *Great Northern Railway Co.*[3]; *Davies* v. *Powell Duffryn Associated Collieries* (*No.* 2)[4] were referred to.]

Montague Berryman Q.C. and *Malcolm McGougan* for the defendants. The authorities show clearly that voluntary payments, from whatever source they may come, if consequent on the death, may be taken into account.

[BIRKETT L.J. You must link the payment with the death.]

It is submitted that in this case nothing is solved, in principle, by asking whether before the death there was reasonable anticipation that the money would be paid. Here there is a payment in fact made after the death, and the question is whether it is a payment which ought to be taken into account by the court in assessing the damages. Apparently the only cases which deal with voluntary pensions are *Baker* v. *Dalgleish Steam Shipping Co.*[5] and *Lory* v. *Great Western Railway Co.*[6]

[SOMERVELL L.J. Is there any case where, apart from Crown pension funds, a voluntary payment, not made as a legal right, has been taken into account?]

The fund from which the gift of £575 was paid was the wife's estate and was released by the death of the wife. *Baker* v. *Dalgleish Steam Shipping Co.*[7] is an authority, binding on this court, that the mere fact that a payment is voluntary does not mean that it is outside the assessment of damages.

[BIRKETT L.J. If some kind person after the accident, having sympathy with the plaintiff, had presented him with a sum of £500, would that come within the assessment of damages as resulting from the death of the wife?]

No. It would come into the category of a fund or contribution which has come into existence after the death of the wife.

SOMERVELL L.J. This appeal raises the question whether a certain sum which the dependant husband received should, in an action under the Fatal Accidents Act, 1846, have been taken into account, as it was by the judge, in assessing damages. It is worth reminding oneself that section 2 provides: " . . . and in " every such action the jury may give such damages as they may " think proportioned to the injury resulting from such death to " the parties respectively for whom and for whose benefit such " action shall be brought. . . ." [His Lordship stated the facts and continued:]

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[1] [1922] 1 K.B. 361; 38 T.L.R. 245.

[2] [1947] N.I. 167.

[3] (1863) 4 B. & S. 396.

[4] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[5] [1922] 1 K.B. 361.

[6] [1942] 1 All E.R. 230.

[7] [1922] 1 K.B. 361.

When the case was opened Mr. O'Connor did not know of the facts which emerged from certain answers which the plaintiff gave in cross-examination. He was asked whether there was some understanding during the life of the deceased that her children would make some arrangement for him, and he said: " Not to my knowledge." Then he was asked whether he had received anything from either of the children, and I will now use language which is a little more accurate than that used in the questions put or by the witness himself. He said that he had received a sum of £575, which was in fact in amount a third of the price realized by the assets which the wife left. That was, as he said, owing to their generosity and was not in pursuance of any arrangement or understanding previously made. The trial judge took that sum into account in assessing damages. He referred to *Baker* v. *Dalgleish Steam Shipping Co.*,[1] and to a Northern Ireland case [*Redpath* v. *Belfast and County Down Railway* [2]], and said [3]: " It is clear that as a result of her death his " two stepchildren have parted with . . . part of the widow's " estate." I will come back to that wording when I have considered the authorities.

I do not wish to add to the many descriptions which there have been of the nature of an action under Lord Campbell's Act, so I will cite what Scrutton L.J. said in *Baker* v. *Dalgleish Steam Shipping Co.*[4]: " The claim is a new right given by Lord Campbell's Act on new principles, not the transfer of any existing " right of the dead man. The claimant is entitled to damages " proportioned to the injury resulting to her from the death, and " that injury must be pecuniary injury. She is not entitled to " money compensation for mental suffering resulting from the " death or for loss of the deceased's society. She is entitled " to claim on the one hand any pecuniary benefit which it is " reasonably probable she would have received if the deceased " had remained alive: *per* Erle C.J. in *Pym* v. *Great Northern* " *Railway Co.*[5] It is not necessary that she should have a legal

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[1] [1922] 1 K.B. 361.
[2] [1947] N.I. 167.
[3] [1954] 1 W.L.R. 805.
[4] [1922] 1 K.B. 371.
[5] (1863) 4 B. & S. 396.

"right to have received that benefit from the deceased or should "have actually received any such benefit before the death: *Taff* "*Vale Railway Co.* v. *Jenkins.*[6] It is enough that she had a "reasonable expectation of pecuniary advantage in the future "had the deceased survived, which pecuniary advantage may "be a voluntary contribution from the deceased. On the other "hand, as the question is what is her pecuniary loss by the death, "any pecuniary advantage she has received from the death must "be set off against her probable loss. This is clear if she receives "such advantage as of legal right." Scrutton L.J. went on to consider what we have to consider in this case, the question as to the circumstances in which the court should take into account an advantage which is not received as a legal right. That was the matter which had arisen in *Baker* v. *Dalgleish Steam Shipping Co.*[7] The plaintiff, the wife of the deceased, who was a chief petty officer on board a destroyer, was receiving a pension from the Crown. The question was whether that ought to be taken into account. The argument was, and it was accepted by the trial judge, that it ought not to be taken into account because there was no legal claim to it. No petition of right could have been brought for it by reason of the terms of the Navy Pay and Pensions Order, 1920. I think it is relevant to read paragraph 1 of regulation 10 of that Order: "Pensions to the widows, children, "and dependants of deceased seamen or marines, for which pro-"vision is made in the following articles, shall not be claimed as "a right, but shall be given as a reward of service, and no pension "shall be granted or continued to a widow or dependant who, in "the opinion of the Minister, is unworthy of a grant from public "funds, and it shall be in the power of the Minister to terminate "or suspend any pension that may have been granted to such "persons, or to provide for its administration under such condi-"tions as he may determine." But, as Younger L.J. pointed out in his judgment, subject, of course, to the unworthiness of a grant from public funds referred to in the paragraph, there was every reason when the deceased died for the widow to expect to receive a pension, as did other widows in the same circumstances. Younger L.J. said[8]: "When the traditions of this country in "relation to service pensions are remembered, it may be, I think, "assumed that the fact that these payments are voluntary will, "apart from any question of supervening personal disqualification, "have practically no influence at all upon the question whether

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[6] [1913] A.C. 1.

[7] [1922] 1 K.B. 361.

[8] Ibid. 380.

"or not they will be continued." That decision, therefore, was concerned with a pension based on those provisions of the regulations.

We were referred to all other relevant decisions where a payment which was not a legal claim as of right had been taken into account. In *Baker* v. *Dalgleish Steam Shipping Co.*[7] the court to some extent based their decision as to quantum on an indication in the regulations that the Minister of Pensions might in the exercise of his powers reduce the pension by the amount of damages awarded in an action. The question what was the Minister's procedure and custom with regard to that matter came before this court in *Johnson* v. *Hill*,[9] but that case adds nothing, on the issue with which we are concerned, to what was said in *Baker* v. *Dalgleish Steam Shipping Co.*[7]

We were also referred to a decision of Asquith J. in *Lory* v. *Great Western Railway Co.*,[10] where the question concerned a police pension and also a gratuitous payment from a charitable fund. There is very little indication as to either the regulations governing the pension fund or the customary dealings by the police authorities with those who were in the same position as the plaintiff in that case. It may well be that the pension was on all fours, so far as this issue is concerned, with the Crown pension in *Baker* v. *Dalgleish Steam Shipping Co.*[11] With regard to the payment from the charitable fund there is very little indication in the judgment or argument as to the nature of the fund and the terms governing it. I would like to reserve the question of payment from such funds for consideration should it arise, because I think that it might well depend on the actual terms of the fund and the uniformity of the administration of it.

Various sentences in *Baker* v. *Dalgleish Steam Shipping Co.*[11] were referred to and, quite rightly, relied on; but, as I said in the course of the argument, we are bound by the decision and not by isolated sentences in the judgments, which in any case must be construed in relation to the context. Bankes L.J. said [12]: "I cannot myself see why, when assessing compensation under "Lord Campbell's Act, any distinction should be drawn between "an assessment of what is a reasonable expectation of benefit "had the deceased person lived, and what is the reasonable "expectation of benefit in consequence of the deceased person's "death. Both must be taken into consideration in arriving at

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[7] [1922] 1 K.B. 361.

[9] 61 T.L.R. 398; [1945] 2 All E.R. 272.

[10] [1942] 1 All E.R. 230.

[11] [1922] 1 K.B. 361.

[12] Ibid. 368.

"the real loss." With great respect, I do not find that a very helpful suggestion in approaching this problem. It is easy when one is considering the prima facie loss on evidence as to what the dependant received from the deceased while he was alive— I agree, as Scrutton L.J. said, that there may be an item which has actually never materialized in the life of the deceased, but primarily the sum is based on what the plaintiff was receiving— but when one has to consider the position after death and sums other than those which can be claimed as of legal right, one is in a different area, and not much help is to be had from considering the principles which may be applied in assessing the prima facie injury to the dependants.

Scrutton L.J. also said [13]: "The same principle applies to "voluntary benefits conferred in consequence of the death. Just "as in assessing the loss by the death the probability of voluntary "contribution destroyed by the death of the contributor may be "included to swell the claim, so the probability of voluntary "contribution bestowed in consequence of the death may be used "to reduce the claim by showing what loss the claimant has in "fact sustained by the death." I think that is a useful sentence, in that, in considering whether claims other than claims of legal right are to be brought in, whether payments have been made or not, it is important to consider the position as at the time of the death: Was there at that time any probability or reasonable expectation of a benefit? Applying that test to the present case, I think that it is plain on the evidence that there was none. These stepchildren were evidently fond of their father and they realized that he had benefited from their mother's business and they determined out of the assets realized to make a present; but there was no expectation by him of a present when the deceased died.

There is, I think, another aspect of this matter which is very well stated in *Redpath* v. *Belfast and County Down Railway*.[14] That was not a fatal accident case, though one or two of the fatal accident decisions were referred to. There had been a railway accident which was caused by the negligence of the railway company's servant. A number of people had been killed or injured, and the public had subscribed to a fund which was used to help those who had been injured as well as the dependants of those who had been killed. The defendants sought to interrogate the plaintiff as to what payments, if any, he had received from the fund. The Lord Chief Justice held that that was an irrelevant matter and could not be brought into account. He said, after referring to some of the fatal accident cases [15]: "In these circumstances common sense and natural justice appear to me to rise "in revolt against the proposition that the money so subscribed "should be diverted from the objects whom the subscribers "intended to benefit in order to be applied in reduction of the "damages properly payable by the wrongdoer as compensation "to the victims for their loss. Why, one may well ask, should "the defendants' burden be lightened by the generosity of the "public?" I think that one can say in the same way in this case: why should the burden on the defendants be lightened by the generosity of the stepchildren? I realize, of course, that a defendant may find his or her burden lightened, for instance, by the fact that the deceased, usually a husband, has saved money which goes to his wife as a result of the death.

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[13] [1922] 1 K.B. 361, 372.

[14] [1947] N.I. 167.

I think that the clue to this problem is first of all to consider the actual facts of *Baker* v. *Dalgleish Steam Shipping Co.*,[16] to which I have referred. I do not express the view at all that that is a line beyond which no voluntary payment would be taken into account—I think that it would be only in very unusual circumstances that a voluntary payment would be taken into account when there was no expectation of it at the time of the death. It seems to me that that indicates for itself that there is a nova causa interveniens which makes the payment not in consequence or as a result of the death within the meaning of the statements which have been made with regard to this problem.

To return to the way in which the judge put it, I would have said that this payment was not made as the result of the deceased's death. Of course, it would not have been made unless the wife had died, but I would have said that it was the result of the stepchildren's consideration, and perhaps affection for their stepfather. Also, it is not accurate to describe it as part of the widow's estate. There is no evidence as to what other resources, if any, the stepchildren had. It was a third of the amount which they got as the result of the mother's will. For these reasons I would allow the appeal.

BIRKETT L.J. I am of the same opinion. [His Lordship stated the facts and continued:] The principles upon which damages are assessed under Lord Campbell's Act are now perfectly plain. The measure of the damage is the pecuniary loss suffered by the dependant as a result of the death. In estimating that pecuniary loss it was said in this case that a sum of £575, which admittedly the plaintiff received, ought to be brought into account. I think that some of the trouble in this case arises because of the way that sum was introduced. Mr. O'Connor said that until the plaintiff was cross-examined in the court below he (counsel) had no idea that there had been a payment of any kind. The way it came out was this: "(Q) Was there not some arrangement, some "understanding, that some provision was to be made for you out "of her estate? (A) Not to my knowledge. (Q) Have you "received anything from either of the children? (A) Yes. (Q) "What have you received from the children? (A) I am holding "a third share of the estate. That is owing to their generosity, "though. (Q) How much does that amount to? (A) £575. "(Q) It was your wife's wish, was it not, that that should be "done? (A) Not to my knowledge. I did not know she had "made a will." The answer, "I am holding a third share of the "estate," has possibly led to some slight confusion. When the judge considered this matter in his judgment he put it in this way, which I think is the more accurate way to put it [17]: "But "in addition there remains the fact that after the two children "had come into the property and it was sold, all the estate was "distributed and they paid over voluntarily to the husband a "sum of £575, said to represent about a third of the estate." It is quite clear, I think, from the evidence, first of all, that the plaintiff had no idea what was in the wife's will. When it turned out that he was not even mentioned in the wife's will he certainly had no expectation that he would receive any part of what his wife left. It would appear further from the evidence that he did not receive it until the two stepchildren had had the money arising from the estate given to them by process of law. They had realized the estate, sold the property, and had the cash in hand. Then, as my Lord put it, out of generosity or affection, what they did, quite voluntarily, was to pay the plaintiff £575 as a gift, which is in fact, we are told, about one-third of the estate.

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[15] [1947] N.I. 167, 175.

[16] [1922] 1 K.B. 361.

It was said that the plaintiff must bring that payment into account because it lessened the pecuniary loss which he had suffered. We have had a great many cases cited to us, including *Baker* v. *Dalgleish Steam Shipping Co.*,[18] which concerned voluntary payments of pension by the fund which were taken into account; and *Lory* v. *Great Western Railway Co.*,[19] where there were two matters, a pension paid to a policeman's widow and a further payment made out of another fund. It was said that those cases illustrate what the principle is which ought to be followed in this case. I, for my own part, am satisfied that this payment by these stepchildren to the plaintiff was a voluntary payment which ought not to be taken into account. I have already pointed out that it is quite clear from all the facts that he had no expectation that any such payment would be made, and I am clear in my own mind that this was not a payment which was made as a consequence of the wife's death.

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[17] [1954] 1 W.L.R. 804.

[18] [1922] 1 K.B. 361.

In one of the cases cited to us, *Davies* v. *Powell Duffryn Associated Collieries Ld. (No.* 2),[20] Lord Wright in his speech said [21]: "The Act of 1846, s. 2, provides that the action is to be "for the benefit of the wife or other member of the family, and "the jury (or judge) are to give such damages as may be thought "proportioned to the injury resulting to such parties from the "death. The damages are to be based on the reasonable expecta-"tion of pecuniary benefit or benefit reducible to money value. "In assessing the damages all circumstances which may be "legitimately pleaded in diminution of the damages must be "considered: *Grand Trunk Railway Co. of Canada* v. *Jennings.*[22] "The actual pecuniary loss of each individual entitled to sue can "only be ascertained by balancing, on the one hand, the loss to "him of the future pecuniary benefit, and, on the other, any "pecuniary advantage which from whatever source comes to him "by reason of the death."

Mr. Berryman suggested that this sum out of which the £575 came was released, as he put it, by the death of the wife and was in fact part of her estate. He said that the fact that the children out of goodwill or affection or generosity had paid this sum voluntarily to the plaintiff did not prevent it from being taken into account. There is no question at all but that if the wife had not been killed none of this would have arisen at all. In that sense it is a sequence of the death of the wife because all these events followed upon her death; but it by no means follows that the payment in question is by reason of the death. It is a sequence which is by no means a complete sequence. This £575, admittedly paid by the stepchildren, was their own money. A larger sum had been left by the will. The estate had been realized

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[19] [1942] 1 All E.R. 230.

[20] [1942] A.C. 601.

[21] Ibid. 611.

[22] (1888) 13 App.Cas. 800; 4 T.L.R. 752.

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and it was their money for them to do with exactly as they wished. It so happened that they wished to pay £575 as a gift to the husband.

I decide this case for myself on the simple point that this payment in the circumstances of this case was not money paid by reason of the death. I agree with the judgment which my Lord has delivered.

ROMER L.J. I also agree.

Appeal allowed.

Solicitors: *R. I. Lewis & Co.; Wm. Easton & Sons.*

A. W. G.

ELLERBY *v.* MARCH (VALUATION OFFICER).

[LVC/193/1952.]

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Somervell,
Birkett and
Romer L.JJ.

Rates and Rating—Lands Tribunal—Jurisdiction—Whether competent to entertain questions not the subject-matter of appeal or cross-appeal—Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 48 (3) (4), 49 (1)*—Lands Tribunal Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 42), *ss.* 1, 3*—Lands Tribunal Rules,* 1949 (*S.I.* 1949, *No.* 2263), *rr.* 9, 38 (4).

The Lands Tribunal, on the hearing of an appeal from a local valuation court, has jurisdiction to adjudicate only on matters brought before it by an appellant, and the words ". . . may give "any directions which the local valuation court might have given" contained in section 49 (1) of the Local Government Act, 1948,[1] do not enlarge the jurisdiction of the tribunal, but are merely a compendious way of incorporating into that section, in relation to an appellant before the tribunal, the directions which a local valuation court is empowered to give under section 48 (4) of the Act in relation to an appeal before it.

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[1] Local Government Act, 1948, s. 48: "(3) On the hearing of an "appeal to a local valuation court "—(*a*) the appellant; and (*b*) the "valuation officer, when he is not "the appellant; and (*c*) the owner "or occupier of the hereditament "to which the appeal relates, when "he is not the appellant; and (*d*) "the rating authority for the area "in which the hereditament in ques-"tion is situated, when that autho-"rity is not the appellant . . . shall "be entitled to appear and be heard "as parties to the appeal and to "examine any witness before the "court and to call witnesses. (4) "After hearing the persons men-"tioned in the last preceding sub-"section, or such of them as desire "to be heard, the local valuation "court shall give such directions "with respect to the manner in "which the hereditament in ques-"tion is to be treated in the valua-"tion list as appear to them to be

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

On July 10, 1952, the occupier of a hereditament entered an objection to a proposal of the valuation officer for the alteration of the valuation list in respect of the property. Notice of appeal to the local valuation court was given by the valuation officer. On September 25, 1952, the local valuation court heard and determined the appeal and directed that the valuation list be altered by substitution of the description contained in the proposal for the previous description, and that the gross and rateable value of the property be raised to figures above those previously appearing in the valuation list, but below those contained in the proposal. The ratepayer gave notice of appeal to the Lands Tribunal. On November 12, 1952, the valuation officer gave notice of intention to appear at the hearing of the appeal. Before the tribunal the valuation officer raised the point that although there was no appeal or cross-appeal by him, the tribunal had jurisdiction by virtue of section 49 (1) of the Act to increase the assessment made by the local valuation court up to the figures contained in the proposal. The tribunal rejected that contention and affirmed the decision of the local valuation court. On appeal:—

Held, that the tribunal were right in so doing.

Case stated by the Lands Tribunal.

The ratepayer was the owner and occupier of property situated at Fairby Hill, Ash Road, Hartley, Longfield, Kent, which before June 20, 1952, was described in the valuation list for the Dartford Rural District as " House and premises," and entered at a gross value of £27 and a rateable value of £20. On June 20, 1952, the valuation officer duly made a proposal for the alteration of the valuation list in respect of this property by substituting the description " workshops, garages, stores, tanks, house and " land " and an assessment of gross value £140, rateable value £113, for the descriptions and the assessment then contained in

" necessary to give effect to the con- " tention of the appellant if and so " far as that contention appears to " the court to be well founded, and " the valuation officer shall incor- " porate in the list as settled, or, as " the case may be, cause to be made " in the list, such alterations as are " necessary to give effect to those " directions."

S. 49: " (1) Any person who, in " pursuance of the last preceding " section, appeared before a local " valuation court on the hearing " of an appeal and is aggrieved by " the decision of the court thereon " may, within twenty-one days from " the date of the decision, appeal to " [the Lands Tribunal] . . . and the " [tribunal] after hearing such of " the persons as appeared as afore- " said as desire to be heard, may " give any directions which the local " valuation court might have given."

the list. The grounds of the proposal were that the buildings and land at the rear of the house had not been included in the valuation list, that a structural addition had been made, and that the previous assessment was incorrect and unfair.

Notice of objection to the proposal was made by the ratepayer on July 10, 1952, on the grounds that the buildings in question were included in the 1934 valuation list or, alternatively (if they were not), that they were exempt as agricultural buildings, and that if the buildings were rateable the proposed assessment was excessive and inequitable in relation to comparable hereditaments.

Notice of appeal to the valuation court was given by the valuation officer on July 18, 1952, and on September 25, 1952, the valuation court heard and determined the appeal and directed that the valuation list be altered by substitution of the description mentioned in the proposal for the previous description, and that the values of the property be inserted therein at the figures of gross value £100, rateable value £80.

The ratepayer gave notice of appeal to the Lands Tribunal on October 13, 1952. On November 12, 1952, the valuation officer gave notice of intention to appear at the hearing of the appeal. Before the tribunal the valuation officer raised a point of law concerning the jurisdiction of the tribunal on an appeal from the local valuation court. He argued that, although the valuation officer did not appeal against the reduction by the valuation court of his assessment, the tribunal had jurisdiction to increase the assessment made by that court. He said that subsection (1) of section 49 of the Local Government Act, 1948, was the only subsection of that section which had not been repealed by section 10 (4) and the Second Schedule to the Lands Tribunal Act, 1949, because it was the intention to transfer, in its entirety, the county court jurisdiction to the Lands Tribunal. He drew attention to section 1 (3) (*e*) of the Lands Tribunal Act, 1949, which brought within the tribunal's jurisdiction any question upon which an appeal or reference to the county court would or might be made, by virtue of sections 49, 62 or 87 of the Local Government Act, 1948. He pointed out that section 49 of the Local Government Act, 1948, empowers the tribunal to give any directions which the local valuation court might have given; and the local valuation court, he submitted, was fully empowered to give a decision confirming his proposal of gross value £140, rateable value £113. He invited attention to section 3 (6) of the Act of 1949, and submitted that, having regard to the terms thereof as to the matters on which rules might be made, rule 38 (4) of the Lands Tribunal Rules, 1949, was ultra vires.

The tribunal were unable to accept that contention. They agreed that the jurisdiction which the county court originally possessed had been transferred to the tribunal and that they could do on appeal that which the county court was entitled to do. Had the valuation officer appealed against the decision of the local valuation court the tribunal entertained no doubt that they were vested with jurisdiction to assess the hereditament in accordance with the proposal, if they came to the conclusion that the proposal was justified; but in their opinion they were faced with the question of what were the directions which the valuation court might have given. These are stated in section 48 (4) of the Local Government Act, 1948. The appellant before the tribunal was the ratepayer, and what the local valuation court would have been entitled to do had the ratepayer been appellant before that court would have been in the words of the section to " . . . give such directions with " respect to the manner in which the hereditament in question is " to be treated in the valuation list as appear to them to be " necessary to give effect to the contention of the appellant if " and so far as that contention appears to the court to be well " founded."

The tribunal came to the conclusion that the intention of section 49 of the Local Government Act, 1948, was to give the tribunal jurisdiction to deal with an appellant before them in the same manner as the local valuation court could deal with an appellant before that court. It was no part of the contention of the ratepayer before the tribunal that the assessment of the local valuation court should be increased, and the tribunal were of the opinion that if they were unable to accept any part of the ratepayer's contention the proper course for them to follow was to confirm the assessment of the local valuation court. Moreover, that procedure was in accordance with rule 38 (4) of the Lands Tribunal Rules.

For these reasons they decided to confirm the decision of the local valuation court that the gross value was £100 and the rateable value £80. As the tribunal did not accede to the argument on behalf of the valuation officer regarding their jurisdiction, they did not consider the question whether the values of £140 gross value and £113 rateable value were not excessive and should be inserted in the valuation list.

The question for decision was whether the tribunal on the above finding of facts came to a correct decision in law.

Maurice Lyell Q.C. for the valuation officer. The question is: On an appeal from the local valuation court to the Lands Tribunal, does the tribunal rehear the matter and make any order which the local valuation court could have made? It is submitted that the tribunal has power so to do by virtue of the concluding words of section 49 (1) of the Local Government Act, 1948: " . . . may " give any directions which the local valuation court might have " given." Accordingly, the tribunal had power to increase the gross value of the property in question to £140 and the rateable value to £113. It is significant in this connexion to compare the language of section 48 (4) with that of section 49 (1). If it had been intended to limit the tribunal's jurisdiction to refusing or acceding to the contention of the appellant before it, one would have expected the language of section 49 (1) to have been modelled on that of section 48. The fact that the language of section 49 (1) is markedly different from that of section 48 shows that Parliament intended that the matter should be res integra before the tribunal, or, in other words, that the tribunal might proceed as if there were a cross-appeal before it in all cases.

That contention is supported by the language of rule 9 of the Lands Tribunal Rules, 1949 (made under the Lands Tribunal Act, 1949), which provides: " (1) Every person upon whom a copy of " the notice of appeal is served shall, if he intends to appear on the " hearing of the appeal, give written notice of his intention to do " so stating . . . (ii) the grounds on which he intends to rely; "(iii) whether he does or does not propose to call an expert witness " to give evidence in support of any valuation." Accordingly, a person other than the appellant, upon giving the requisite notice, may appear before the tribunal which, on the language of the rule, has jurisdiction to consider and decide upon *any valuation* which is brought before it; not necessarily by the appellant.

Rule 38 (4) appears at first sight to vitiate the above contention. It provides: " On an appeal against the decision of a local valua- " tion court, the tribunal shall give such directions with respect " to the manner in which the hereditament is to be treated in the " valuation list as appear to the tribunal to be necessary to give " effect to the contention of the appellant if and so far as that " contention appears to the tribunal to be well founded." The rules cannot, however, in any way limit the operation of those sections of the Act which give jurisdiction to the tribunal. It is submitted that the matters referred to in section 49 (1) of the Act relate to jurisdiction and not to procedure and therefore, in

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so far as rule 38 (4) purports to limit the jurisdiction of the tribunal under that section, it is ultra vires.

Michael Rowe Q.C. and *F. A. Amies* for the ratepayer. The tribunal came to a correct conclusion, and for the reasons set out in the case stated, the argument put forward on behalf of the valuation officer might lead to great injustice, as illustrated by the following example: A factory having been assessed at £5,000, the ratepayer appeals to the local valuation court, which reduces the assessment by £500, and directs that the premises be derated. The valuation officer then decides to appeal to the tribunal on the question of assessment, and the ratepayer having already obtained a reduction of over £3,000 in rateable value through derating, is content to allow the appeal to go by default. The rating authority, however, appears at the hearing and contends that the derating was wrongly allowed. If the ratepayer was not a party to the appeal, when that point of law was argued by the valuation officer, the ratepayer would receive no notice of that contention, and the tribunal might decide the point in favour of the rating authority in his absence. [Reference was made to *Ex parte Wier* [2] and *Attorney-General* v. *De Keyser's Royal Hotel.*[3]]

Lyell Q.C. replied.

SOMERVELL L.J. stated the facts, and continued: The question raised by this case is whether the only appeal being by the ratepayer, it was open to the Lands Tribunal to hear and consider evidence led by the valuation officer, or the rating authority on giving notice, with a view to increasing the figure from that directed by the local valuation court to something above that figure, but not exceeding the sum originally submitted by the valuation officer. The tribunal held that they were not entitled to raise the figure, but only to consider the formal appeal before them by the ratepayer, who was contending that the value should be lowered below that directed by the valuation court. The question is whether that decision was right in law or whether, as Mr. Lyell contended on behalf of the valuation officer, the tribunal had jurisdiction under the relevant Acts to entertain an application by the valuation officer that the figure should be as high as originally proposed although he himself had not appealed.

The Local Government Act, 1948, provided that appeals from a local valuation court should be to the county court. When the

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[2] (1871) L.R. 6 Ch. 875, 879.

[3] [1920] A.C. 508, 531; 36 T.L.R. 600.

Lands Tribunal was set up under the Lands Tribunal Act, 1949, that tribunal was substituted by section 1 (3) (*e*) for the county court, but there was no amendment or alteration of the words in the Act of 1948. We were rightly taken through the various somewhat complicated sections dealing with the procedure in relation to appeals at the different stages, but in my view it is unnecessary to refer in detail to them. I think that this question can be made sufficiently clear by considering sections 48 and 49 of the Act of 1948. Section 48 relates to the procedure where there is a notice of appeal to a local valuation court, and it provides who is entitled to appear and be heard as parties to the appeal, the appellant, the valuation officer, when he is not the appellant, the owner or occupier, when he is not the appellant, the rating authority when it is not the appellant, and a fifth class which we need not consider. [His Lordship then read subsection (4) of section 48 and section 49 (1) of the Act of 1948, and continued:]

On the facts stated in the present case, the local valuation court could have done anything from directing that the figures should remain as they were, £27 gross and £20 rateable value, up to the alteration proposed by the valuation officer of £140 gross and £113 rateable value. Therefore, it is submitted that, however limited the ambit of the appeal might be in this or other cases the final words of section 49 (1) confer a statutory jurisdiction on the appellate tribunal, which must not be restricted by any procedural condition precedent, to hear and determine all the issues which were raised and raisable before the original local valuation court notwithstanding, as I have said, the ambit of the appeal.

I have come to a clear conclusion that these words do not support that contention. In my opinion their true meaning is to be found by referring back to section 48 (4) and seeing what are the directions which the local valuation court might have given. They are: "such directions . . . as appear to them to be "necessary to give effect to the contention of the appellant if "and so far as that contention appears to the court to be well "founded." In my judgment one has to read that limitation into section 49 (1), substituting, of course, for the county court the Lands Tribunal, which is now the appellate court. In my view that is the natural meaning of those words, but if there is any ambiguity I think that it falls to be resolved by a consideration of the procedure in relation to rating appeals in the past, the nature of legal proceedings in general, and considerations of convenience. The general principle on which all courts and

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tribunals found their jurisdiction is that they deal with matters which parties bring before them, and it would be quite exceptional to find them dealing with matters which parties have not brought before them. Matters are brought before them in some formal document such as a writ or summons or, in the case of an appellate tribunal, a notice of appeal. It would have needed very clear words to satisfy me that it could have been intended that an appellate court should deal with issues other than those which an appellant brought before it.

I quite follow that where one is dealing with quantum, there is no great difficulty in giving to section 49 (1) the construction for which the valuation officer contended. I fully accept also that this is a proper matter to be brought before this court and there may well be cases, when the new valuation list becomes operative, where a decision in this case in the valuation officer's favour might be of benefit to ratepayers who have not taken the trouble to put in notices of appeal. But where one is dealing, as one may be, with matters other than a mere question of quantum, I think that grave inconvenience might arise, subject to a point on the rules to which I will later refer. Suppose that in the present case, the local valuation court having reduced the amount for which the valuation officer was contending, he wanted to appeal and to submit that the figure should be raised to the figure which he had originally proposed, or to some figure higher than that directed by the court. That would give no indication that any issue other than quantum was involved, and I think that it would be most inconvenient if the ratepayer, without serving any notice of appeal, was entitled on the hearing of that appeal to argue the issue that the hereditament should be in whole or in part derated under one or other of the Acts which derate certain hereditaments. That inconvenience, it is said, is dealt with by the present rules.

If the wider construction, which, in my view, the tribunal were right in rejecting, were right, then, Mr. Lyell submitted, rule 38 (4) of the Lands Tribunal Rules, 1949, would be ultra vires. That rule provides: "On an appeal against the decision of a local valuation court, the tribunal shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to the tribunal to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the tribunal to be well founded." Mr. Lyell further submitted that any rule which purported to provide that matters outside what I will call the first appeal could be raised only in a second appeal, that is, to the

Lands Tribunal, if a notice was served within the prescribed time, would also be ultra vires. On the other hand, there is rule 9, which provides: "(1) Every person upon whom a copy of the "notice of appeal is served shall, if he intends to appear on "the hearing of the appeal, give written notice of his intention to "do so stating . . . (ii) the grounds on which he intends to rely; "(iii) whether he does or does not propose to call an expert "witness to give evidence in support of any valuation." Acting on that rule in the present case the valuation officer did raise this question, that he was going to ask the Lands Tribunal to raise the figure. It was said that that would prevent the inconvenience to which I have referred. In my view, rule 9, which is drafted in very general terms, appears at first sight to be based on the wider construction, but it has to be construed and read in the light of rule 38.

If Mr. Lyell were right and rule 38 were ultra vires, and it were sought to rely on rule 9 as meaning that there must be a notice before a matter outside the ambit of the actual appeal could be raised, then I would have thought that rule 9 must also be ultra vires. On the view which I take, however, both rules are in accordance with the provisions of the Act. In the last paragraph of the case the Lands Tribunal set out the issues very clearly, and they come to the conclusion which, in my opinion, is the right one on the question of construction.

BIRKETT L.J. I am of the same opinion. I should like to add a word with regard to Mr. Lyell's argument upon the construction of section 49 (1) of the Local Government Act, 1948. When he first opened this appeal he presented the point for decision in these words: "When an appeal comes from the local "valuation court to the Lands Tribunal, does the Lands Tribunal "re-hear it and make any order the local valuation court could "have made?" I must say that when it was presented in that form I was in some measure attracted by the argument which he put forward because, undoubtedly, the local valuation court in the present case could have given a decision upon the proposal of the valuation officer to increase the gross value to £140 and the rateable value to £113. They did consider it. That was the proposal before them and, as we now know, they made their decision on different figures. But they might have done that, and I understand that Mr. Lyell was saying that when one finds the concluding words of section 49 (1) to be that the Lands Tribunal may give any directions which the local valuation court might give one cannot exclude that consideration. He supported it by this argument: he said, when those words appear in section 49 (1) in the form in which they do and it is sought to say that they merely mean what is contained in section 48 (4), that cannot be; because otherwise Parliament would merely have repeated the same words. He contended for a wider meaning, namely, that the Lands Tribunal might do all that the local valuation court might have done.

After consideration I am of opinion that the position as stated by my Lord as to the construction of this section is the right one. As regards the words " . . . may give any directions which the local " valuation court might have given," the Lands Tribunal itself dealt with the argument in this way: " We agree that the jurisdiction which the county court originally had has been transferred " to the Lands Tribunal and that it can do on appeal what the " county court was entitled to do. Had the valuation officer " appealed against the decision of the local valuation court we " have no doubt that we are vested with jurisdiction to assess the " hereditament in accordance with the proposal, if we came to the " conclusion that the proposal was justified; but in our opinion " we were faced with the question: what were the directions " which the local valuation court might have given?" and then they proceeded to state what my Lord has already said, that they are still within section 48 (4) of the Local Government Act, 1948. I agree with the judgment which has just been delivered.

ROMER L.J. I also agree. It seems to me that were it not for two points the argument which Mr. Lyell addressed to us could scarcely have been presented at all. The first point arises out of the words in section 49 (1): " . . . may give any directions " which the local valuation court might have given." The valuation officer's suggestion with regard to that is that the county court, and now the Lands Tribunal, could make an order having the same range and scope as that which the local valuation court could have made at the hearing before them. I think, however, that that argument is subject to a fallacy in that it treats the appellant before the Lands Tribunal as being the same person as appeared as appellant before the local valuation court. That is not so or may not be so. In my judgment, all that section 49 means is that the Lands Tribunal shall have the same powers mutatis mutandis as the local valuation court would have in an appeal before them. I would only add that it seems to me to be an almost impossible conception that an appellate court should treat an appeal as though it had been brought by someone else than the appellant, and (in the absence of a cross-appeal) adjudicate upon matters which the appellant himself had not brought before it. The truth, I think, is that the words "may "give any directions," and so on, are merely a compendious way of incorporating in section 49 (1), in relation to an appellant before the Lands Tribunal, the directions which a local valuation court is empowered to give under section 48 (4) in relation to an appeal which is brought before them.

The second point arises from the language of rule 9 of the Lands Tribunal Rules, 1949. One of the things which a party who intends to appear on the hearing of an appeal must do is to give written notice of intention stating, among other things, whether he does or does not propose to call an expert witness to give evidence in support "of any valuation." If one takes that language by itself it might appear to mean that the tribunal is to consider and decide upon any valuation which may be brought before it by persons other than the appellant. But that rule, as my Lord has pointed out, has to be read in conjunction with rule 38 (4) which makes it plain that that is a wrong way of interpreting rule 9. Mr. Lyell suggested that rule 38 (4) is ultra vires, but I am quite satisfied that that is not so because it puts, as I think, on section 49 of the Act a meaning which, in my opinion, is plainly the right one and quite in accordance with the language in which the legislature expressed itself. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Kinch & Richardson for T. G. Baynes & Sons, Dartford.*

HARVELL v. FOSTER AND ANOTHER.

[1952 H. No. 1442.]

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June 17;
July 16.

Evershed M.R., Jenkins and Hodson L.JJ.

Administrator—Administration bond—Will—Cesser of liability—Estate cleared and net residue in hands of administrator—Failure of administrator to pay residue to residuary legatee—"Well and truly "administer"—Meaning—Infant—Executor and residuary legatee—Grant of administration during minority—Date of termination of administration — Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 42—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 160 (1), 165, 167.

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A testator gave all his estate to his daughter, the plaintiff, and appointed her his sole executrix. He died in 1948, when the plaintiff was under 21 years of age. Administration with the will annexed was granted to the plaintiff's husband during her minority. The husband and two solicitors as sureties gave to the principal probate registrar a joint and several administration bond that the husband would "well and truly administer" the estate "according to law" and, further, that he would "make or "cause to be made a just and true account of the administration "of the said estate." The solicitors acted for the husband in the administration and got in and realized the testator's estate, paid his debts and funeral and testamentary expenses and paid the balance, which exceeded £950, to the husband. Subsequently, the husband quarrelled with the plaintiff, paid her £300 and turned her out of the matrimonial home. He then disappeared and never had accounted for the balance of the estate. The plaintiff attained 21 in 1950 and, the bond having been assigned to her, she claimed against the solicitors as sureties under the bond. Lord Goddard C.J. dismissed the action, holding that once the clear residue was in the husband's hands, his character changed from that of administrator to that of trustee and thereupon the defendants' obligations under the bond ceased. On appeal:—

Held, that upon the true construction of the bond the husband had not "well and truly administered the estate according "to law". The defendants' liability persisted at least up to the end of the period of the grant. A personal representative, who has cleared the estate and become a trustee of the net residue for the persons beneficially interested, does not necessarily and automatically become discharged from his obligations as personal representative and, in particular, from the obligation of any bond into which he may have entered for the due administration of the estate; the duty of an administrator, as such, must at least extend to paying the funeral and testamentary expenses and debts and legacies, if any, and, where immediate distribution is impossible owing to the infancy of the person beneficially entitled, to retaining the net residue in trust for the infant; and, until the administrator can show that he has done that, he cannot be said to have duly administered the estate according to law.

The provisions of section 42 of the Administration of Estates Act, 1925, carried the necessary implication that until a personal representative, having in his hands assets to which an infant was absolutely entitled, either availed himself of the power thereby conferred to appoint a trust corporation or two or more individuals as trustees for the infant and upon such appointment vested the assets in such trustees, or accounted for or paid them over to the infant on his attaining the age of 21 years, the administrator remained liable for them in his character of personal representative. The defendants, as sureties, could not assert that the husband's obligations as administrator and consequently their own liability under the bond ceased automatically on his receiving the clear residue.

Observations of Sargant J. in *In re Ponder* [1921] 2 Ch. 59 on when an administrator becomes functus officio, questioned.

Archbishop of Canterbury v. *Robertson* (1833) 1 Cr. & M. 690 followed.

Decision of Lord Goddard C.J. [1954] 1 Q.B. 591; [1954] 1 All E.R. 851 reversed.

APPEAL from Lord Goddard C.J.

The plaintiff, Anne Elizabeth Harvell, claimed as assignee of an administration bond £699 13s. 9d., from the defendants, Robert Tonge Foster and Alfred John Michael Maidlow Davis, solicitors, who were made sureties under the bond for the due administration of the estate of the plaintiff's father, William George John Askew.

The following statement of facts is taken from the judgment of the court: By his will, dated October 24, 1947, the plaintiff's father, William John Askew (hereinafter referred to as "the "testator"), gave all his real and personal estate wheresoever and whatsoever to the plaintiff (then Anne Elizabeth Askew, spinster) absolutely and appointed her sole executrix of such will. The testator died on February 8, 1948. The plaintiff was at that time an infant just under 19 years of age, having been born on March 26, 1929. She was living with the testator at his house known as Leys Cottage, Church Hill, East Down, in the county of Devon. On April 22, 1948, the plaintiff married one Don Eric Harvell (hereinafter referred to as "the husband"). The plaintiff, by reason of her infancy, could not obtain a grant of probate of the testator's will and, under the advice of Messrs. Chanter, Burrington & Foster, application was made in the principal probate registry for the issue to the husband of a grant of administration to the estate of the testator with the will annexed during the minority of the plaintiff in accordance with the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925.[1]

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[1] Supreme Court of Judicature (Consolidation) Act, 1925 (as amended), s. 160: "(1) Probate or administration "shall not be granted to more than "four persons in respect of the same "property, and administration shall, "if there is a minority or if a life "interest arises under the will or in-"testacy, be granted either to a trust "corporation, with or without an "individual, or to not less than two "individuals: Provided that the court "in granting administration may act "on such prima facie evidence, fur-"nished by the applicant or any "other person, as to whether or not "there is a minority or life interest, "as may be prescribed by probate "rules and orders."

S. 165: "(1) Where an infant is "sole executor of a will, administra-"tion with the will annexed shall be "granted to his guardian, or to such "other person as the court thinks fit, The provisions in section 160 (1) of the Act to the effect that, where there is a minority, administration shall be granted to a trust corporation with or without an individual or to not less than two individuals, are not regarded as applicable to the case of a grant during the minority of an infant sole executor pursuant to section 165, even though the infant is also beneficially interested. In the present case the application for a grant to the husband alone was acceded to. In compliance with section 167 (1) the husband, as the intended administrator, and the two defendants, as sureties, gave to the principal probate registrar a joint and several administration bond, dated May 26, 1949, in the form prescribed by the Non-Contentious Probate Rules, and, this having been done, the grant to the husband was made on June 13, 1949.

The administration bond so given by the husband and the two defendants was in the sum of £2,698 (that being the prescribed penalty of double the gross value of the testator's estate as sworn for the purposes of the grant, namely, £1,348 13s. 7d.), and it was conditioned as follows: " The condition of this obliga-" tion is such that if the above named Don Eric Harvell the duly

" until the infant attains the age of " twenty-one years, and on his attaining that age, and not before, probate of the will may be granted to " him.

" (2) Where a testator by his will " appoints an infant to be an executor, the appointment shall not " operate to transfer any interest in " the property of the deceased to the " infant or to constitute him a personal representative for any purpose " unless and until probate is granted " to him under this section."

S. 167: " (1) Every person to whom " a grant of administration is made " shall give a bond (in this section " referred to as ' an administration " ' bond ') to the senior registrar of " the Probate Division by the name " of ' the principal probate registrar,' " and, subject to the provisions of this " section, if the principal probate " registrar, or, where the grant was " made in a district registry, the district probate registrar, so requires, " with one or more sureties conditioned for duly collecting, getting " in, and administering the real and " personal estate of the deceased.

" (2) The principal probate registrar " for the time being shall have power " to enforce any administration bond " or to assign it in accordance with " the provisions of this section to " some other person.

" (3) An administration bond shall " be in such form as may be directed " by probate rules and orders.

" (4) Where it appears to the satisfaction of the court or a judge that " the condition of an administration " bond has been broken, the court or " judge may, on an application in that " behalf, order that the bond shall be " assigned to such person as may be " specified in the order, and the person to whom the bond is ordered " to be assigned shall be entitled by " virtue of the order to sue thereon " in his own name as if it had been " originally given to him instead of " to the principal probate registrar, " and to recover thereon as trustee " for all persons interested the full " amount recoverable in respect of the " breach of the condition thereof."

"elected curator or guardian of Anne Elizabeth Harvell the sole "executrix and sole residuary legatee or devisee under the will "of William John Askew, deceased, of Leys Cottage, Church "Hill, East Down, aforesaid salesman who died on February 8, "1948, and the intended administrator (with the will) of all the "estate which by law devolves on and vests in the person representative of the said deceased for the use and benefit of the "said Anne Elizabeth Harvell and until she shall attain the age "of 21 years do, when lawfully called on in that behalf, make "or cause to be made a true and perfect inventory of the said "estate which has or shall come to the hands, possession or "knowledge of the said intended administrator, and the same so "made do exhibit or cause to be exhibited, into the Principal "Probate Registry of the said Division, whenever required by "law so to do, and the said estate do well and truly administer "according to law and further do make or cause to be made a "just and true account of the administration of the said estate "whenever required by law so to do, then this obligation to be "void and of none effect, or else to remain in full force and "virtue."

The grant to the husband was in the usual form for a grant with will annexed during the minority of a sole infant executor and was expressed to be granted to him as "the lawful husband "of and the guardian duly elected by the said minor" (that was, the plaintiff) "for the use and benefit of the said minor "until she shall attain the age of 21 years." The main asset of the testator's estate consisted of his house, Leys Cottage, which was valued for the purposes of the grant at £1,300. This, with personalty sworn at £48 13s. 7d., made up the gross value of £1,348 13s. 7d., as against which there were a mortgage on the house of £166 9s. 9d. and funeral expenses and debts amounting to £31 10s. 9d., leaving a net estate, as sworn for the purposes of the grant, of £1,150 13s. 1d.

After the grant to the husband had been made, he and the plaintiff left Leys Cottage and went to live with his mother at 24, Westmoor Road, Enfield, Middlesex. Messrs. Chanter, Burrington & Foster, as agents for the husband, sold Leys Cottage, got in the small outstanding items of personal estate, paid the mortgage and other debts and the funeral and administration expenses, and retained their own costs. The net residuary estate resulting from these operations amounted to £999 13s. 9d. Messrs. Chanter, Burrington & Foster duly paid that sum to the husband, as to £950 by a cheque generally on account sent to the

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husband at Enfield in a letter dated July 11, 1949, and acknowledged by him on the following day, and as to the balance of £49 13s. 9d. by a cheque sent to the husband at Enfield, together with their account, in a letter dated August 24, 1949, and acknowledged by him on the 27th of the same month. It appears that between July 11 and August 24, 1949, Messrs. Chanter, Burrington & Foster had got in an asset which remained outstanding on the former date in the shape of a sum of £28 4s. 0d. due from the Co-operative Insurance Society.

According to the uncontradicted evidence of the plaintiff, the course of events after the husband received the cheque for £950 was as follows: The cheque was cashed and the husband put the money in a drawer in the bedroom. Within the next few days he spent £350 of it in the purchase of a lorry. The plaintiff said that she agreed to that transaction at the time and that the van was, so the husband told her, registered in their joint names. Later the parties quarrelled, and, on August 5, 1949, the husband demanded that the plaintiff should take £300 of the remaining £650, make over the van and the balance of the estate to him, and leave his mother's house where they were living. He prevailed upon her to sign some form of consent to that division of the estate, gave her the £300 and made sure of her leaving by driving her to the station and putting her on the train for London. The plaintiff had not seen or heard from the husband since they parted on that occasion. He had left Enfield and his present whereabouts were unknown. By November, 1949, she had come to realize that the husband had tricked her out of her money and consulted Messrs. Chanter, Burrington & Foster, whose efforts on her behalf produced no result, apart from a letter dated December 30, 1949, from the husband in reply to a letter addressed to him at 24, Westmoor Road, Enfield. That letter from the husband was headed " c/o 24, Westmoor Road, Enfield, Middlesex " (the solicitors' letter having apparently been forwarded to him by his mother at an address which he did not choose to disclose) and was in these terms: " Dear Sir, Reference your " letter dated December 21 that I have just received. When my " wife left me she took with her £300 in cash and left behind a " large bill amounting to £80. This I have paid. During our " stay at Leys Cottage, I spent about £280 of my own money " in building material, also putting in a year's hard work trying " to make an old cottage into a fit house for us. I also paid a " lot of my late father-in-law's debts from my own money. The " horses, harness and cart also belonged to me. After the

" cottage had been put in order, my wife wanted it sold, and " even went so far as to take poisons, so that I had to call in " Barnstaple police, in her endeavour to make me sell it. I " think I realize now what my wife intended to do but you upset " her plans when you sent the cheque in my name. She " demanded the money at once and kept on demanding for days, " and caused so much trouble in my mother's house I gave her " £300 in cash. She left me one hour later, taking our son " and her belongings, saying I could go to hell and she had got " something at least. The rest of the money I have invested in " a home for our son, whom I shall endeavour to claim from " my wife in the near future. At the moment I am sending " her an allowance each week. Yours faithfully, D. Harvell." That was the last communication received from the husband by anyone concerned in the case and, in short, the husband, and with him the lorry and the balance of cash remaining after the payment to the plaintiff of the £300, had disappeared. His final letter was significant in that, so far from acknowledging the plaintiff's right to the net residue of the estate, it manifested an intention on his part to convert to his own use the whole of such residue over and above the £300 and attempted to justify his conduct in doing so. According to the plaintiff's evidence, the weekly allowance referred to at the end of the letter appeared to have been part of a disability pension to which the husband was entitled, and it was inferred that it must have been paid to the plaintiff under a standing arrangement which did not involve any communication between them.

Ultimately the plaintiff, having attained the age of 21 years on March 26, 1950, took other advice, under which an order for the assignment of the bond to her was obtained on January 25, 1952, and the writ in the present action was issued on April 8, 1952. By her statement of claim, the plaintiff, after stating the circumstances in which the grant of administration was made to the husband, and the defendants' joinder in the administration bond, described as " subject to the condition inter alia that if " the husband " should well and truly administer the said estate " according to law the said bond should be void," went on to allege (in paragraph 5) that the husband " did not well and truly administer the estate according to law but misappropriated £699 13s. 9d. part of the assets of the said estate and failed to " account therefor to the plaintiff," with particulars of that allegation to the short effect that, after getting in the assets and paying the debts and funeral and testamentary expenses shown in the solicitors' account dated August 24, 1949, there remained in the hands of the husband as administrator a balance of £999 13s. 9d.; that on or about August 5, 1949, he paid to the plaintiff £300; but that save as aforesaid he failed to account to her for such balance or any part thereof. The statement of claim went on to refer to the order of January 25, 1952, for the assignment of the bond to the plaintiff, and to claim that the plaintiff was entitled to recover from the defendants, as trustee for all persons interested in the said estate, the said sum of £699 13s. 9d., with a prayer for payment to her accordingly of the sum of £699 13s. 9d. with interest thereon from March 26, 1950, until payment or judgment.

In response to a request by the defendants, further particulars of paragraph 5 of the statement of claim were given to the effect that (a) the husband "misappropriated the sum of £699 13s. 9d. "by failing to hand it over to the plaintiff on her attaining the "age of 21 years and by retaining it thereafter and absenting "himself from her and failing to disclose his whereabouts to her "with the result that she was unable to recover the money and "with the intention of depriving her of the same"; and (b) the husband "failed to account for the said sum by failing to render "any account thereof to the plaintiff on her attaining the age "of 21 years and by absenting himself from her and failing to "disclose his whereabouts to her with the intention of depriving "her of the said money."

The defendants delivered a defence which described in some detail the part which they had taken in the administration of the estate as solicitors advising and acting for the plaintiff and the husband.

Lord Goddard C.J. dismissed the action, holding that the defendants' obligation under the bond had ceased when the net residue was paid to the husband.

The plaintiff appealed.

Harold Christie Q.C. and *C. E. Rochford* for the plaintiff. The plaintiff's husband did not automatically cease to be an administrator when the testator's debts had been paid. An administrator is in fact a trustee, since the definition of trustee in the Trustee Act, 1925, s. 68 (17), includes a personal representative. The fact that a personal representative becomes a trustee when the administration is cleared does not mean that he then ceases to be a personal representative. In the case of land, an assent must be executed before he ceases to hold the land as personal representative. In the case of personalty, some further act is necessary before the administration is closed as regards any particular item of personal property. When the estate was cleared the husband should have appointed new trustees of the residue in accordance with the provisions of section 42 of the Administration of Estates Act, 1925. The defendants should have made that a condition before they entered into the bond. It appears from *Archbishop of Canterbury* v. *Robertson*[2] that liability under a bond does not cease when the deceased's debts are paid. If that were the case, the bond would be of little use. Payment to the beneficiaries is part of the administration. A personal representative has not "well and truly administered" until debts are paid: see *Dobbs* v. *Brain.*[3] If a personal representative converts the estate to his own use, it does not matter on what date he does so, if the estate is not available when the date for payment to the beneficiaries arrives. Section 42 of the Trustee Act, 1925, is intended to meet the difficulty which arises where owing to the infancy of a beneficiary payment cannot be made to him: see *Attenborough* v. *Solomon.*[4] If Lord Goddard C.J. were right, section 42 would, in effect, be a dead letter. It appears from *In re Ponder*,[5] following *Eaton* v. *Daines*,[6] that when an estate has been cleared an administrator can appoint trustees of the net balance, but, if Sargant J. meant to hold that when an estate is cleared a personal representative ceases to hold the assets in that capacity, he was wrong. In *In re Yerburgh*[7] Romer J. held that administrators should execute an assent when the debts had been paid. [Reference was also made to *In re Mackay.*[8]]

Pascoe Hayward Q.C. and *John Monckton* for the defendants. The question is when, on the true construction of the bond, the husband had administered the estate in accordance with the bond. The bond should be construed in favour of the bondsmen. The burden is on the plaintiff to show that in accordance with its terms the condition of the bond was not fulfilled. This administration was closed when the testator's debts and funeral and testamentary expenses were paid. The estate was then cleared and the husband's function as administrator ceased and he became a trustee for the plaintiff. He received the estate as

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[2] (1833) 1 Cr. & M. 690.

[3] [1892] 2 Q.B. 207; 8 T.L.R. 630.

[4] [1913] A.C. 76; 29 T.L.R. 79.

[5] [1921] 2 Ch. 59.

[6] [1894] W.N. 32; 10 T.L.R. 594.

[7] [1928] W.N. 208.

[8] [1906] 1 Ch. 25.

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administrator and spent it as trustee. The statement of the law by Sargant J. in *In re Ponder*[9] is right. That decision is referred to without adverse comment in Underhill on Trusts, 10th ed., p. 450, in Williams on Executors, 13th ed., p. 868, and in Walker on Executors and Administrators, 6th ed., p. 369. If the plaintiff's contentions were correct, administrators could not close the administration until the beneficiaries were paid, and in the case of infant beneficiaries bondsmen might remain liable for many years. *Archbishop of Canterbury* v. *Robertson*[10] is distinguishable, since the bond under consideration there was in a different form from that here. It appears from *In re Pitt*[11] that after the appointment of trustees by the administrator the bondsmen would cease to be liable. The court cannot appoint trustees if the administration is still in progress. The appointment must be on the footing that it is closed. *Dobbs* v. *Brain*[12] was the case of a legacy. An administration is not closed until the legacies are paid. When the debts and legacies are paid, a trustee can be appointed to replace the personal representative, and at the moment of time when that can be done the administration is closed and the liability under the bond ceases.

John Monckton following. An alternative way of putting the defendants' case is that while a personal representative is clothed with that character all his life, the administration is closed when the estate is cleared and he becomes a trustee of the net assets. The offices of personal representative and trustee are mutually exclusive as regards any particular piece of property. It is sought to distinguish the office of personal representative from the task of administration. A grant de bonis non is required where a personal representative has not discharged himself in respect of land by assent. That is not required in the case of personalty. Here the husband had duly completed the administration and held the moneys paid to him as trustee for the plaintiff and the defendants as bondsmen are not liable.

Harold Christie Q.C. in reply. The reasons given for the decision in *In re Ponder*[13] were based on a wrong view of the law.

July 16. EVERSHED M.R. read the judgment of the court.

EVERSHED M.R. This is an appeal by the plaintiff, Anne Elizabeth Harvell, from a judgment of Lord Goddard C.J. dated

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[9] [1921] 2 Ch. 59.
[10] 1 Cr. & M. 690.
[11] (1928) 44 T.L.R. 371.
[12] [1892] 2 Q.B. 207.
[13] [1921] 2 Ch. 59.

March 12, 1954, dismissing an action brought by her against the two defendants, Robert Tonge Foster and Alfred John Michael Maidlow Davis (partners in the firm of Chanter, Burrington & Foster, solicitors of Barnstaple), on an administration bond in which the defendants had joined as sureties, such bond having been given in respect of a grant to the plaintiff's husband of representation to the estate of her late father. The question in the case is whether the admitted default of the plaintiff's husband constituted a breach of the condition of the bond, so as to entitle the plaintiff to judgment against the defendants as sureties.

[His Lordship read sections 160, 165 and 167 of the Supreme Court of Judicature (Consolidation) Act, 1925, stated the facts and continued:] There is no doubt that from first to last the defendants acted with perfect good faith. They personally saw to the administration of the estate down to the ascertainment of the clear residue and were at pains to explain to the husband, before they paid it over to him, that he as administrator must hold it in trust for the plaintiff until she attained the age of 21 years. Nevertheless, by joining as sureties in the administration bond, they made themselves responsible for the due administration of the estate by the husband, and if, upon the true construction of the bond and in the events which happened, the husband's default constituted a failure on his part well and truly to administer the estate according to law within the meaning of the condition, they must be held liable for it. The facts are not now in dispute and, apart from a plea of laches and acquiescence on the part of the plaintiff, which was rightly not persisted in, the only answer to the plaintiff's claim raised by the defence consists of a submission, which prevailed before Lord Goddard C.J., to the effect that the husband's action in misappropriating the balance of the estate constituted a breach of the trusts of the testator's will and not a devastavit of his estate and that the plaintiff's true cause of action was an action against the husband for breach of trust. This submission, as it appears in the defence, is not happily phrased. There were, of course, no trusts of the testator's will, which contained a direct gift of the entire residue to the plaintiff, and the only impediment to the immediate payment to her of the clear residue, so soon as it was ascertained, consisted in her infancy.

The defendants' argument may be more clearly and accurately expressed in the following four propositions: (1) The condition of an administration bond in the form here in question relates and relates only to administration, that is to say, to the due performance by the administrator of his duties as an administrator. (2) An administrator who has got in the estate and paid all the funeral and testamentary expenses and debts, and legacies, if any, is functus officio as administrator quoad the resultant clear residue of the estate and thenceforth holds such residue in trust for the person or persons beneficially interested under the relevant will or intestacy, and is answerable for it not as administrator of the estate but as a trustee. (3) Therefore, if an administrator, after he has become a trustee in accordance with proposition (2), misapplies or converts to his own use the assets so held in trust by him, it follows from proposition (1) that neither he nor his sureties are liable under the bond, for his default is not a breach of his duty as administrator, which has been fully performed, but a breach of his duty as trustee of the residue for the person or persons beneficially entitled, to which the condition of the bond has no application. (4) It follows from the foregoing that, on the facts of this case, the defendants are absolved, for the £999 13s. 9d. paid over by Messrs. Chanter, Burrington & Foster to the husband represented the clear residue of the estate, which, from the moment of its receipt by him, was held by the husband not as administrator but as trustee, and, when he converted it to his own use, he did so in the latter and not the former capacity.

Lord Goddard C.J. accepted this argument. He came to the conclusion that the estate had been "well and truly administered "according to law" within the meaning of the condition of the bond at the moment when all debts and expenses had been paid or discharged (for there were here no legacies), the moment when, as Mr. Pascoe Hayward phrased it in argument, "the estate "had been cleared," the moment, that is to say, when the administrator had in his hands the sum of money to which, as universal legatee under the will, the plaintiff was absolutely entitled. It is to be observed that if this view is right, then, if the interval is ignored between the payment of the £950 on account and the final payment of £49 13s. 9d. (and the defendants have, rightly as we think, claimed that on the plaintiff's case as pleaded it should be ignored) the risk undertaken by the sureties was negligible and the protection afforded by their suretyship to the plaintiff was nugatory; for the "clearing" of the estate was done by them, on the administrator's behalf, and the "administration" (in the limited sense given to that expression by Mr. Pascoe Hayward) was concluded at the same instant that the proceeds of the "administration" were paid over to the administrator.

There is, moreover, to our minds, a manifest incongruity in the assertion that an administrator during minority has well and truly administered the estate according to law for the use and benefit of the infant, when what he has in fact done is to receive the net residue, from agents acting on his behalf in the administration, to convert the greater part, or, for that matter, the whole, of such residue to his own use and to abscond without accounting. But Lord Goddard C.J. regarded the question as, in effect, determined by the judgment of Sargant J. in *In re Ponder*,[1] as deciding that once the debts and expenses and any legacies had been discharged or satisfied and the clear residue of the estate ascertained, then an administrator became, as such, functus officio, and must be treated as holding such residue, not as administrator but as a trustee. The Lord Chief Justice cited[2] the following passage from Sargant J.'s judgment[3]: "*Eaton* v. *Daines*,[4] a decision of Kekewich J., shows clearly that "when an estate has been wound up, and the trust property is "in the hands of an executor freed from the administration of "the estate, the office is then changed from that of executor to "that of a trustee"; and he proceeded to conclude that "the "reference to *Eaton* v. *Daines*[4] and the cases therein cited seems "to make it clear that the administrator holds the residue "after the debts and legacies are paid in the capacity of trustee "and not of administrator."

We have come to a different conclusion. In our opinion, upon the failure on March 26, 1950 (when the plaintiff attained the age of 21 years), of her husband to account for the proceeds of realization of the testator's estate, having in fact (save as to £300) misappropriated it to his own use, the latter was shown not to have "well and truly administered" the estate "according to law" within the true meaning and intent of the bond. Upon the more general question, it is unnecessary in the present case for us to attempt any formulation of the circumstances in which a personal representative may be said to cease to act as such and to assume the office and function of a trustee; but if Sargant J. in *In re Ponder*[5] is to be taken to have decided that once a personal representative, by clearing the estate, has discharged all his functions other than those of a trustee for the persons beneficially interested in the net residue, and has thus become a trustee for those persons, he must be regarded, merely by virtue of such clearance, to have discharged himself from all his obligations as personal representative, because the capacities of personal representative and trustee are mutually exclusive, then we think the proposition too widely stated. We shall return later in this judgment to *In re Ponder*[5] itself and the cases therein cited. At this point it is sufficient to note that the definition of "trustee" in the Trustee Act, 1925 (s. 68 (17)) includes a personal representative, that the Administration of Estates Act, 1925 (the title of which is not without significance), includes in Part III (headed "Administration of Assets") section 33, which provides that the estate of an intestate is vested in the personal representative "upon trust" for sale, calling in and conversion, section 39, which gives personal representatives various powers of management "for purposes of administration, or during "minority of any beneficiary or the subsistence of any life "interest, or until the period of distribution arrives," and section 42 which empowers personal representatives, where an infant is absolutely entitled (inter alia) to the residuary estate of the deceased, to appoint a trust corporation or two or more individuals (whether or not including themselves or one or more of themselves) to be trustee or trustees thereof for the infant, and thereby discharge themselves from all further liability in respect of the property in question, and to add that Part IV of the same Act, being the part devoted to the devolution of the estates of persons dying intestate and headed "Distribution of "Residuary Estate," is expressed throughout in terms of trusts.

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[1] [1921] 2 Ch. 59.

[2] [1954] 1 Q.B. 591, 596; [1954] 1 All E.R. 851.

[3] [1921] 2 Ch. 59, 62.

[4] [1894] W.N. 32.

[5] [1921] 2 Ch. 59.

We return to the construction of the bond itself and note, first, the description at the beginning of the condition of the bond of the plaintiff's husband as "the intended administrator ". . . of all the estate which by law devolves on and vests in "the personal representative of the said deceased for the use "and benefit of the" plaintiff "until she shall attain the age "of 21 years"; and, secondly, that the letters of administration granted to the husband were expressly limited to be for the use and benefit of the plaintiff and until she should attain the age of 21 years.

Further, it is to be noted that the vital words "do well and "truly administer," etc., are immediately followed by the words "and further make or cause to be made a just and true account

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[5] [1921] 2 Ch. 59.

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" of the administration of the said estate whenever required by " law so to do." Even if the vital formula was not apt, according to its natural sense and meaning (as we think it is), to render the bondsmen liable in the present case as upon a breach of the condition " well and truly to administer," the following words, which we have cited and which are part of the relevant context, seem to us to make insensible such a limitation of liability as the defendants seek: for the obligation to make a true account of the " administration " must persist at least up to the end of the period of the grant.

In our judgment, moreover, the result which commends itself to us follows from the decision in *Archbishop of Canterbury* v. *Robertson*.[6] The facts (apart from the terms of the bond) in that case seem to us on all fours with those of the present; for in the former, as in the present, the administrator misappropriated to himself part only, though not the whole, of the estate. It is true that the terms of the bond in the cited case differed from those of the present and contained a separate condition, on the face of it peculiarly applicable to the facts of the case. But the plaintiff also relied as a separate head of claim on breach of the obligation in the bond " well and truly to administer the " goods of the intestate according to law "—words, for practical purposes, identical with those in the present case: and the Court of Exchequer held that such words, according to their natural meaning, extended so as to make the sureties liable, and also laid it down that the intent of such an obligation in an administration bond was not limited so as to be for the better security of creditors only, but was meant to enure for the benefit of those who would take as next-of-kin.

We cite two passages from the judgment of the court delivered by Lord Lyndhurst C.B. The first is as follows[7]: " Now, looking at the language of the bond, nothing can be more distinct " and precise than those terms of the condition. They are, that " he shall well and truly administer, according to law, the effects " which shall come to his hands, and all other the effects of the " intestate that shall come to the hands of any person or persons " for him to be administered. It would seem difficult to entertain any doubt upon the natural construction of these words, " and nothing would be a more direct infringement of the terms " of the condition than the application of the effects of the " intestate to his own use, and the converting them to his own " purposes, so that they should be entirely lost to the estate of

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[6] (1833) 1 Cr. & M. 690.

[7] Ibid. 708.

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"the intestate." Later, Lord Lyndhurst C.B. referred to an earlier case, *Browne* v. *Archbishop of Canterbury*,[8] and said of it[9]: "That decision, as I understand it, amounted to this—that "the object of the Act was not to provide a remedy for creditors, "for they already had by law a remedy for the recovery of their "debts; and therefore, that the breach so assigned was not "within the intent and meaning of the Act of Parliament—within "the meaning of the legislature at the time they passed that "law," a principle which the court held equally applicable to the construction of the bond then in suit.

Dobbs v. *Brain*,[10] in which *Archbishop of Canterbury* v. *Robertson*[11] was cited, is, in our judgment, to the same effect. It is true that in that case the default of the administrator had been in paying a small legacy of £50 to a person not entitled to receive it or to give a receipt for it; and it may no doubt be said that at the time when the administrator purported to pay the £50 legacy the estate could not have been "cleared," in the sense that the residue had been finally ascertained. But we have been unable to see any sensible or logical distinction for this purpose between misapplying a legacy or misapplying a share of residue, or any sensible or logical ground for the view that the bondsmen's liability will depend upon whether any legacy (however small and presumably whether presently payable or not) remains unsatisfied.

We return to *In re Ponder*,[12] by which Lord Goddard C.J. regarded the case as governed. As the judge observed, the point decided by the case was whether the widow, to whom letters of administration had been granted to the estate of an intestate, could, in the circumstances, invoke the terms of section 25 of the Trustee Act, 1893; that is, on the footing that she had become a trustee of the three separate funds into which she had divided and set apart the residue of the proceeds of the estate for the respective benefit of persons or classes of persons entitled as heir-at-law and under the Statutes of Distribution, and could call upon the court to appoint additional trustees to act with her in respect of the appropriated funds. As Mr. Christie observed, the conclusion was certainly one of convenience; and, on the facts of the case, we do not say that Sargant J. was not entitled to treat the applicant as having in fact and in truth constituted herself a trustee (within the terms of the Trustee Act, 1893) of the three funds. But it does not necessarily follow that she had therefore altogether cast off her duties and capacity as administratrix. To take an obvious illustration, if at some later date (that is, after Sargant J.'s decision) it had been necessary to join, in an action for the administration of some other estate, a representative of the estate of the intestate Ponder, the widow would have been rightly joined and entitled to appear, alone, as administratrix. The truth, no doubt, is, as Mr. Monckton submitted, that in the ordinary case a personal representative, once appointed, retains for all time that character, though he may, and at some stage presumably will, have exhausted all his duties or functions as such. Upon that point we pause only to repeat that the present is not an " ordinary " case, for the husband, by the terms of his appointment as administrator, ceased altogether to have that character on March 26, 1950.

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[8] (1683) 1 Lut. 363.
[9] 1 Cr. & M. 690, 710.
[10] [1892] 2 Q.B. 207; 8 T.L.R. 630.
[11] 1 Cr. & M. 690.
[12] [1921] 2 Ch. 59.

The novel point raised in *In re Ponder* [12] and decided by Sargant J. was that one appointed administrator of an intestate's estate could, in due course of time, assume the character and functions of a trustee in the same way as one appointed by will executor and trustee (as was the case in *Eaton* v. *Daines* [13]), so as to be able to invoke the statutory powers of appointing new or additional trustees. *In re Ponder* [14] appears to have been since followed on one occasion: *In re Pitt.*[15] Whether or not it was rightly decided on its own facts, it is unnecessary for us to determine. But, as we have earlier indicated, we are unable to accept the view, which Sargant J.'s language read without qualification would seem to support, that because a personal representative who has cleared the estate becomes a trustee of the net residue for the persons beneficially interested, the clearing of the estate necessarily and automatically discharges him from his obligations as personal representative and, in particular, from the obligation of any bond he may have entered into for the due administration of the estate. We would add that, in our view, the duty of an administrator, as such, must at least extend to paying the funeral and testamentary expenses and debts and legacies (if any) and where, as here, immediate distribution is impossible owing to the infancy of the person beneficially entitled, retaining the net residue in trust for the infant. At least until the administrator can show that he has done this, it cannot, in our judgment, be said of him that he has duly administered the estate according to law. The husband in the present case did not retain the net residue in trust for the infant plaintiff, but, on the contrary, converted the greater part of it (that is to say, all except the £300) to his own use, and, moreover, sought in his letter of December 30, 1949, to justify his conduct by claims of right which, as he has not condescended to come forward and prove them, cannot now be regarded, but which were wholly inconsistent with any recognition or acknowledgment on his part that the assets in his hands represented a clear residue held by him in trust for the plaintiff. In any event, as Mr. Christie contended, section 42 of the Administration of Estates Act, 1925, now makes provision for the case of an infant, who is absolutely entitled to a legacy or residue or some share therein under a will or intestacy, there being (in the case of a will) no appointment of trustees on the infant's behalf; and enables the personal representative to appoint a trust corporation or two or more individuals as trustees for such infant and, upon such appointment and vesting of the property in the trustees so appointed, to be discharged from further liability in respect thereof. That provision (which incidentally meets the Lord Chief Justice's difficulty as to the protracted liability of bondsmen in the case of a very young infant beneficiary) seems to us to carry a necessary implication to the effect that, until a personal representative having in his hands assets to which an infant is absolutely entitled, either avails himself of the prescribed method of obtaining his discharge from further liability (scilicet, as personal representative) in respect of those assets, or accounts for and pays them over to the infant on his or her attaining the age of 21 years, he remains liable for them in his capacity as personal representative. This, in our judgment, makes it still more difficult, and indeed impossible, for the defendants to assert that the husband's obligations as administrator, and consequently their own liability under the bond, ceased automatically upon his receiving the net residue, although the procedure laid down by section 42 for relieving the husband from further liability as administrator was not complied with.

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[12] [1921] 2 Ch. 59.
[13] [1894] W.N. 32.
[14] [1921] 2 Ch. 59.
[15] (1928) 44 T.L.R. 371.

Accordingly, we would allow this appeal.

Appeal allowed.

Solicitors: *Bailey, Breeze & Wyles; White & Leonard for Chanter, Burrington & Foster, Barnstaple.*

B. A. B.

In re A. B. (AN INFANT).†

1954
Apr. 27, 28.

Lord Goddard C.J., Hilbery and Donovan JJ.

Children and Young Persons—Care of—Child received into care of local authority—Child boarded out under statutory agreement—Desire of mother to place child in home of putative father—Refusal of foster-parents to deliver up child—Whether local authority entitled to recover child from foster-parents—Jurisdiction of court—Welfare of child—Duties of local authority in relation to children—" Care "—Children Act, 1948 (11 & 12 *Geo.* 6, *c.* 43), *ss.* 1, 13—*The Children and Young Persons* (*Boarding-Out*) *Rules,* 1946 (*S.R. & O.* 1946, *No.* 2083), *rr.* 4, 8 (1), *Sch.*

A local authority which had under section 1 (1) of the Children Act, 1948, assumed care of an illegitimate child whose mother was unable to look after it, boarded the child out with foster-parents under a boarding-out agreement which in accordance with statutory provisions contained, inter alia, an undertaking by the foster-parents to allow the child to be removed when required by any authorized person. Subsequently the putative father of the child married and the child's mother, who was unmarried, notified the local authority that she desired to place the child with the putative father and his wife. The local authority considered that they were bound under section 1 (3) to follow the wishes of the mother and requested the foster-parents to deliver up the child. The foster-parents refused and the local authority applied for a writ of habeas corpus directed to the foster-parents. The foster-parents contended that in the circumstances the local authority had no power to recover the child and that to be handed over to the putative father and his wife would be contrary to the welfare of the child. Gerrard J. ordered that the child be handed over by the foster-parents to the local authority, and by the latter to the putative father and his wife.

On appeal by the foster-parents:—

Held, (1) that as between the foster-parents and the local authority, the reasons why the local authority required the child were irrelevant and the foster-parents, having taken the child under an agreement with the local authority and on the terms, in accordance with statutory provisions, that they would return the child if required by the local authority, were bound to deliver up the child.

(2) That the local authority had required the foster-parents to deliver up the child as a step in carrying out the duty and the discretion given them by section 1 (3) to hand the child back to the mother or to endeavour to secure that its care was taken over by a relative (the putative father) or a friend. The court, therefore, had no prerogative power to consider the welfare of the child or to decide between the respective merits of the two homes, for so to do would be to usurp the duty and discretion placed on the local authority by Parliament. The appeal, accordingly, must be dismissed.

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† This case was heard in camera and is reported by permission of the court.

Per Lord Goddard C.J. Where there is no order of a court committing a child to the care of the local authority and the local authority have assumed care of the child under section 1 of the Children Act, 1948, the local authority, if satisfied that the parent desires to take over the care of the child, are bound under section 1 (3) to deliver up the child to the parent.

Per Lord Goddard C.J. and Hilbery J. " Take over the care " in section 1 (3) does not mean take over personal care of the child but contemplates the provision of proper accommodation, maintenance and upbringing.

Per Donovan J. A parent who proposes to abandon to someone else every decision regarding a child's welfare and upbringing does not " desire to take over the care of the child " within the meaning of section 1 (3).

Semble. A foster-parent may be a " friend " within the meaning of section 1 (3) (*b*).

Order of Gerrard J. modified.

APPEAL from Gerrard J.

In February, 1951, a diocesan committee for the welfare of children asked the children's officer of the local authority to find a home for an illegitimate female child born in August, 1950. At that time the mother of the child, who was unmarried and who earned her living as a domestic servant, was living with the child in a home run by the committee. The putative father of the child, one X, was then a bachelor; no affiliation order was obtained against him, but he made some contributions to the child's upkeep.

On March 30, 1951, the local authority assumed care of the child under section 1 of the Children Act, 1948,[1] and on the same day, with the mother's knowledge and consent, boarded the child out with foster-parents, a childless couple. The foster-parents signed a boarding-out agreement which, in accordance with the Children and Young Persons (Boarding-Out) Rules, 1946, r. 8 (1) and the schedule, contained, inter alia, the following provision: "I will allow [the child] to be removed from my home "by any person duly authorized by the council or by the children's "committee." Thereafter, the child remained in the home of the foster-parents who brought her up with all due care.

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[1] Children Act, 1948, s. 1: " (1) " Where it appears to a local autho- " rity with respect to a child in their " area . . . (*a*) that he has neither " parent nor guardian or has been . . . " abandoned . . . or is lost; or (*b*) that " his parents or guardian are, for the " time being or permanently, pre- " vented . . . from providing for his " proper accommodation, maintenance " and upbringing; and (*c*) in either " case, that the intervention of the " local authority under this section is " necessary in the interests of the " welfare of the child, it shall be the " duty of the local authority to receive " the child into their care under this " section. (2) Where a local autho- " rity have received a child into their " care under this section, it shall . . . " be their duty to keep the child in " their care so long as the welfare of " the child appears to them to require " it. . . . (3) Nothing in this section " shall authorize a local authority to " keep a child in their care under this " section if any parent or guardian " desires to take over the care of the " child, and the local authority shall, " in all cases where it appears to " them consistent with the welfare of " the child so to do, endeavour to " secure that the care of the child " is taken over either (*a*) by a parent " or guardian . . . or (*b*) by a rela- " tion or friend of his, being, where " possible, a person of the same reli- " gious persuasion as the child or who " gives an undertaking that the child " will be brought up in that religious

In March, 1951, X married, and in September, 1952, his wife gave birth to a son. X wished to have his illegitimate daughter to live with him and to bring her up, and Mrs. X was willing to have her. In January, 1954, the mother notified the local authority that she desired to place the child with the putative father and his wife, to be brought up by them. The children's committee of the local authority considered that they were bound to follow the wishes of the mother, and being satisfied with conditions at the home of the X's, resolved that, in pursuance of the provisions of section 1 (3) of the Children Act, 1948, they should recover the child from the foster-parents and deliver her to her mother, who was her parent within the meaning of the

"persuasion." S. 13: "(1) . . . a "local authority shall discharge their "duty to provide accommodation and "maintenance for a child in their "care—(*a*) by boarding him out . . . "or (*b*) where it is not practicable "or desirable for the time being to "make arrangements for boarding-"out, by maintaining the child in a "home. . . ."

Children and Young Persons (Boarding-Out) Rules, 1946 (made under s. 84 (2) of the Children and Young Persons Act, 1933), as to the boarding-out of children and young persons committed to the care of a local authority: "R. 4. The local "authority shall . . . make arrange-"ments for every person committed "to their care to be boarded out as "soon as possible with a suitable "foster parent and, where within "three months of the committal of "any person to their care he has not "been boarded out, the authority "shall report forthwith to the Secre-"tary of State the reasons therefor "and shall apply for his consent to "the alternative arrangements "made."

"R. 8 (1). A foster parent shall, on "receiving a foster child to be "boarded out with him, be required "by the local authority to sign in "duplicate an agreement in the form "set out in the Schedule to these "rules or in a form to the like effect."

"R. 13 (1). The local authority "shall remove a foster child from his "foster home if he is no longer suit-"ably placed in that home.

"(2). Where conditions in the "home are found to be seriously "detrimental to the health or safety "of a foster child, the visitor shall "have the power immediately to "withdraw the child from the home.

"Schedule

"Agreement of Foster-parent

"1. I, A. B. of ...., do hereby "agree with the council of the county "of .... that . . . (*f*) I will allow "him to be removed from my home "when required by any person so "authorized."

Act. On January 28, 1954, having previously given notice to the foster-parents of her intention to do so, the children's officer went to the foster-parents' house and requested them to hand the child over to her. The foster-parents refused to do so, and the local authority applied to a judge in chambers for a writ of habeas corpus directed to the foster-parents.

Gerrard J. ordered that the child be handed over to the local authority, and that she should thereafter be handed over by the local authority to Mr. and Mrs. X. The foster-parents appealed, contending that, in the circumstances, the local authority had no power to recover the child, that the paramount consideration must be the welfare of the child, and that to hand her over to Mr. and Mrs. X would be contrary to her welfare.

J. E. Simon Q.C. and *F. Blennerhassett* for the foster-parents. The local authority were wrong in the view which they took of section 1 (3) of the Children Act, 1948, and they have no right to recover the child from the foster-parents. They purported to act under section 1 (3), under which a local authority is not authorized to keep a child if the parent desires to assume care of it, but that is not this case. The local authority do not propose to hand the child over to the mother, but to the putative father, and she would no more be in the care of the mother if she were handed over to Mr. and Mrs. X than she would be if she remained with the foster-parents. They cannot, therefore, act under section 1 (3). Habeas corpus proceedings may only be brought by a person entitled to the custody of a child, and the local authority are not so entitled.

[LORD GODDARD C.J. Who is in loco parentis at the moment? I should have thought that the local authority were.]

The foster-parents are in loco parentis; they can only be ousted if the parent desires to take over the care. "Care" includes actual physical custody. The local authority do not consider that they have any right to retain the child, and if the Act does not authorize them to retain the child they have no right to bring these proceedings. It is the mother who should bring habeas corpus proceedings in this case.

[DONOVAN J. The child is not in the care of the local authority to the exclusion of the foster-parents or in the care of the foster-parents to the exclusion of the local authority. She is in the care of both.]

"Care" is an ambiguous word. The child is in the care of the foster-parents within the natural meaning of the word. The duty of the local authority is to provide accommodation, maintenance and upbringing until the mother wants to assume parental duties herself. Even if section 1 binds the local authority it does not bind the court sitting in habeas corpus proceedings, and once the court is concerned in such proceedings with the question of the custody of a child the paramount consideration is the welfare of the child. [On the question of welfare reference was made to *In re O'Hara* [2]; *In re Carroll* [3]; *Humphrys* v. *Polak* [4]; *In re McGrath* [5]; *Barnado* v. *McHugh* [6] and *Reg.* v. *Gyngall.* [7]]

[LORD GODDARD C.J. If this were a simple case of habeas corpus and we had a free hand we should not have any difficulty in deciding which of the competing parties ought to have the child, but the local authority are acting under statutory powers and duties and it is not a clear case of a simple habeas corpus. The point on which we desire to hear argument is whether we have a free hand, unencumbered by any provision of the statute.]

The court is not primarily concerned with the statute and on general principles has here a free hand. Once the child is before it, the court must consider the welfare of the child, and there is a submission to the directions of the court. The jurisdiction of the court over children is part of the prerogative of the Crown: *Reg.* v. *Gyngall.* [8] The prerogative power can only be taken away by clear words in a statute and there is nothing in the Children Act, 1948, to take away or impinge upon that power.

R. J. Parker for the local authority. The local authority has an indefeasible right, as against the foster-parents, to recover the child, and the reason why the local authority require the child is irrelevant.

[DONOVAN J. The local authority passed a resolution that they are bound to recover the child pursuant to section 1 (3). Supposing that the court considered that the local authority had mis-read section 1 (3) and were not bound to carry out the mother's wishes?]

A local authority has a right to recover any child at any time from foster-parents. The position between the local authority and the foster-parents might have been the same quite apart from the mother's wishes. The only difference that the mother's request to the local authority makes is that in addition to a right to recover the child they also have a duty to do so. The mother's presence before the court in these proceedings is not strictly necessary.

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[2] [1900] 2 I.R. 232.

[3] [1931] 1 K.B. 317; 47 T.L.R. 125.

[4] [1901] 2 K.B. 385.

[5] [1893] 1 Ch. 143; 9 T.L.R. 65.

[6] [1891] A.C. 388; 7 T.L.R. 726.

[7] [1893] 2 Q.B. 232; 9 T.L.R. 471.

[8] [1893] 2 Q.B. 232.

In a normal case the court in habeas corpus proceedings in respect of children exercises a parental jurisdiction, irrespective of legal rights, but the court's powers as parens patriae are limited by the Children Act, 1948, by which Parliament has committed, in certain cases, the task and the right of the supervision of the welfare of children to local authorities. The local authority is the judge within the statute as to what is to be done with children received into or committed to their care, and in so far as a local authority seeks to recover custody of a child in their care it is for them to decide whether that is for the welfare of the child. The local authority have exercised their judgment in this case and come to the court with an indefeasible right.

[LORD GODDARD C.J. Has the court then no control at all over what the local authority does with the child after it has recovered it?]

The position must be looked at as between the local authority and the foster-parents only.

[LORD GODDARD C.J. The reality of the matter here is that if the local authority recover the child they will at once hand it over to Mr. and Mrs. X. It seems odd that the court cannot say that the child must not be given to the Xs.]

That is a matter which Parliament has committed to the local authority. The words "if the local authority are satisfied" and "where it appears to the local authority" occur again and again in the Act. Even if the local authority have mis-read the statute and are not bound to comply with the mother's wishes, they can still press their application because they are satisfied that it is consistent with the welfare of the child that she should go to Mr. and Mrs. X. In the absence of an allegation of bad faith the court cannot go behind the satisfaction of the local authority.

Under section 1 (1) it is for the local authority to decide whether a child is to be received into their care. By section 76 (1) of the Children and Young Persons Act, 1933 (as amended by section 5 of the 1948 Act), a local authority is deemed to be a fit person into whose care children may by orders be committed. It is clear, therefore, that Parliament considered local authorities to be proper persons to decide questions relating to the welfare of children. Although there are no express words in the Act ousting the jurisdiction of the courts, it is submitted that where such questions and decisions as to welfare have been entrusted to the local authority by statute the jurisdiction of the court as parens patriae is ousted on the principles of *Carltona Ld.* v. *Commissioners of Works*[9] and *Point of Ayr Collieries Ld.* v. *Lloyd-George.*[10] An order of the court that the welfare of the child demanded that it should remain with the foster-parents would have the effect of discharging the child from the care of the local authority.

It was the intention of the statute that local authorities should be able to recover children from foster-parents; by section 13 they must in suitable cases board the child out, but foster-parents although they may get de facto custody of the child, may, under rule 8 of the Children and Young Persons (Boarding Out) Rules, 1946, only do so by signing an agreement in statutory form containing a provision that the child will be returned on demand. The proposition contended for by the foster-parents is that any foster-parent who has had a child long enough to gain its affection is entitled to resist a local authority who wishes to get it back, and that the burden is on the local authority to show affirmatively that there will be some betterment in the proposed change. It is for the local authority to say what is to be done with children in their care and whether they are to be discharged from care. If the latter, they must be able to recover the child from foster-parents.

[LORD GODDARD C.J. The local authority in this case might consider it unnecessary to keep the child in their care because the natural father was willing to support it.]

Yes, that is so. [Reference was made to *In re McGrath.*[11]] It would be a very great mischief if foster-parents were encouraged to think that once they had obtained the custody of a child they could secure that it remained with them. The local authority here were right in their reading of section 1 (3). A local authority cannot deprive a parent of parental rights unless they pass a resolution under section 2, and even then they are not the ultimate judges, for, if there is an objection, the parent's rights remain until an order of the court has been made. The only inference from the provision in section 3 (3) that section 1 (3) shall not apply while a resolution under section 2 is in force is that it is only in such cases that a local authority may refuse a parent's request to take over the care of the child. There is no reason why "care" in section 1 (3) should mean personal care, or differ in any way from the "care" taken of a child by a local authority which in all possible cases must board the child out. Subsection (3) on its true construction means that where a local authority has assumed care of a child under section 1 (1) and a parent wishes to take over the arrangements for the care and maintenance of the child, the local authority, unless they pass a resolution under section 2, cannot keep the child but are bound to secure that it is handed over to the parent. Apart from that, subsection (3) provides that a local authority must at all times endeavour to see that the parent reassumes responsibility, or that the child is with a relative or friend. In this case the local authority ask the court to let them do that which they are bound to do by statute—ensure that the child is brought up by a relative.

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[9] [1943] 2 All E.R. 560.

[10] [1943] 2 All E.R. 546.

[11] [1893] 1 Ch. 143.

F. S. Laskey for the mother. The mother is entitled to be heard. Section 1 (3) is relied on. The subsection falls into two parts; it provides (*a*) that nothing shall authorize a local authority to keep a child if the parent desires it, and (*b*) that they must endeavour to make the parent take over the care of the child, or give it into the care of a relative or friend. That is what the local authority wish to do in this case. The arguments put forward on behalf of the local authority on this point are adopted. It is also submitted that the court will consider a natural parent the best judge of what is for the welfare of a child and give effect to the parent's wishes; that is the policy underlying the local authority's actions in this case.

J. E. Simon Q.C. in reply. The right of the local authority is parallel to that of a parent and the local authority are in no special position. The prerogative power of the court as parens patriae to consider the welfare of children can only be taken away by express words in a statute or by necessary implication. There are no such express words in this Act, nor is there any necessary implication, and the court may act in the same way as it would if the child had been boarded out by the mother, and these proceedings were between the foster-parents and Mr. and Mrs. X.

Section 1 (3) lays two separate duties on a local authority. One of those duties, to endeavour to get a parent, guardian, relative or friend to take over the care of the child, if it appears to the local authority to be in the interests of the welfare of the child, is discretionary, but the local authority in this case have not purported to act under that limb of the subsection, nor have they carried out the machinery of it, for they have not made the necessary inquiries. The other duty imposed by the subsection, to hand over the child to the parent if the parent desires it, is mandatory. The local authority say that they are acting under that limb; they have not, therefore, exercised any discretion, nor are they enjoined to do so by the Act, nor have they addressed their mind to the question of the welfare of the child. There is, therefore, nothing to oust the jurisdiction of the court as parens patriae to consider welfare. The power of a local authority to remove a child from foster-parents is subject to the overriding jurisdiction of the court. The provision (*f*) in the statutory boarding out agreement does not take away a child's right to have its welfare considered by the court.

The meaning of the word "care" depends on the facts in each case. [Reference was made to *Brooks* v. *Blount.*[12]] Whatever meaning is given to the word "care" it cannot affect the question whether or not the local authority have exercised a discretion. It is submitted that the court can consider the question of welfare and will only make such an order as is conducive to welfare.

Lord Goddard C.J. An appeal has been brought to this court against a decision of Gerrard J. in chambers, before whom the local authority applied for an order of habeas corpus directed to the foster-parents for the production and delivery up to them of the child.

[His Lordship stated the facts, and continued:] It is only right to emphasize that there is not the smallest suggestion against the foster-parents with regard to their treatment of the child. Indeed, everybody agrees that they have cared for the child as they would a child of their own, and there is no doubt that if this court felt that it had a free hand in the matter, and that it was simply a conflict between the mother and the foster-parents, without having to make reference to the provisions of the Children Act, 1948, and the position of the local authority, the court would probably have had little hesitation in saying that the child should stay where it is. For some curious reason, the putative father, X, who is certainly a relative of the child for the purposes of the Children Act, 1948, says that he wants to have the child; he is now married and has a legitimate child of his own, but his wife is apparently willing to look after the child.

It is right to say also that no one has any suggestion to make against Mr. and Mrs. X. They have a perfectly good home, and apparently the child can be well looked after there. How far it is desirable for an illegitimate child to be living with the wife and the legitimate child of the father is perhaps a matter which deserves very careful consideration. It may be that the local authority has no discretion in the matter, but however willing a husband and wife may be to take the illegitimate child of one of them into their home, where there is a legitimate child, there is frequently a grave risk that the illegitimate child may not get the same care and attention as the legitimate child. Whether that will take place in the present case, I do not know, but it is certainly not a matter which those who have the welfare of the child at heart ought to overlook.

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[12] [1923] 1 K.B. 257; 39 T.L.R. 168.

The present case is a proceeding by the local authority for the return of the child to them, and it is necessary, in considering whether they have a right to the child, to consider the provisions of the Children Act, 1948, because, in my opinion, that Act entirely governs the situation here. Section 1 imposes a duty on the local authority to assume the care of children in certain circumstances. [His Lordship read section 1 (1) and (2), and continued:] It will be observed first, that those subsections put a positive duty on a council to receive a child into their care if they are satisfied of certain things, and the words "Where it "appears" mean where it appears to their satisfaction. If, therefore, there is a child for whom a parent is unable to provide, at the time at any rate, proper accommodation, maintenance and upbringing, as in this case, because the mother had to earn her own living as a domestic servant and there was nobody who would take over the child, it is the duty of the local authority to take the child into their care. It is also their duty to keep the child so long as the welfare of the child appears to require it. Supposing that this child had been a lost child or that its parents were dead, or that it had neither friends nor relatives, it is quite obvious that there was a duty on the local authority, not only to take the child but to keep her.

Parliament has provided, in section 13 of the Act, how the local authority are to carry out that duty. The marginal note to the section states: "Mode of provision of accommodation and "maintenance." It must be remembered that this Act is not an Act consolidating previous Children's Acts, but is a new Act passed following on the recommendations contained in the Curtis Report (Report of the Care of Children Committee, 1946). I think that one thing which it was sought to avoid, if possible, was institutional treatment, and another object was to make proper provision for the inspection of children boarded out. Accordingly, Part II of the Act, in which section 13 is to be found, is headed " Treat-" ment of Children in care of Local Authorities," and the prima facie way in which children are to be treated is that they are to be boarded out with persons selected by the local authority. But these persons take children as foster-parents, and not as adoptive parents. It is often the case that in many of those cases the foster-parents get very fond of the children, but foster-parents who take children under the provisions of the Children Act, 1948, are in quite a different position, as it seems to me, from foster-parents who take a child under a particular agreement between them and the parent of the child. There is no bargain, or an agreement of any sort, with the parent of the child, but an agreement with the local authority, who in placing the child with the foster-parents are performing their statutory duty. The Children and Young Persons (Boarding-Out) Rules, 1946, made under the Children and Young Persons Act, 1933, which are the rules in force under the Children Act, 1948, lay down the terms and conditions under which the child is to be placed with the foster-parents. Rule 8 (1) provides that an agreement must be signed by the foster-parents, and two of the provisions contained in the statutory form of agreement which has to be signed are: " (*e*) I will at all times permit " any person authorized by the Home Office or by the council to " see the child, and his home and clothing, and I will attend to the " advice of any such person; (*f*) I will allow him to be removed " from my home when required by any person so authorized." In the present case, the local authority, for good reason or bad reason, have required the child to be returned to them; the foster-parents refused to return the child, and the local authority, therefore, have applied for habeas corpus to obtain possession of the child by the notional production of its body before the court, and asking the court to hand over the child. No doubt, and there is no secret about it, the local authority intend to hand over the child to Mr. X and his wife; they have said that they at any rate took the view that they were bound under section 1 (3) to do this on the request of the mother.

Before I consider section 1 (3) I want to say this: what answer could there be to the demand of the local authority on the foster-parents to return the child to them in accordance with the undertaking which they have given in a statutory form in pursuance of rules which require them to give that undertaking as a condition of their ever having the child at all? Mr. Simon, in the course of a sustained and interesting argument, has put it in this way: he says that this court is exercising the power formerly exercised by the Lord Chancellor in the Chancery courts of the Kingdom. He says that it is exercising the delegated power of the Crown as parens patriae, that is to say, the guardianship of all infant children and, therefore, no matter what the Act of Parliament says, unless the statute clearly takes away the right of this court, or limits in some way the prerogative right of the Crown as regards infants, this court has the same power as it would have if it was a case simply between the foster-parents and Mr. and Mrs. X. I cannot take that view. The Act of 1948 is new legislation. It introduced a means of protection or care of children which, up to the time of the passing of the Act, did not exist. There was power under the Children and Young Persons Act, 1933, to bring children before the court as in need of care and protection, either on the grounds that they were exposed to moral danger or for other reasons. Under that Act the juvenile court could make an order, committing the child to the care of a local authority, and once the child was in their care neither this court nor any other court so far as I know, could, exercising its power as guardian over infants, proceed to consider whether the child was being looked after in as good a way by the local authority as it would be by someone else, nor, if the local authority had boarded out the child in accordance with the rules, could this court interfere. The Act of 1948 not only enables, but directs the local authority to act without an order of the court. In the present case, having acted in accordance with the statute, the local authority proceeded to take the steps which Parliament by the combined effect of the Act and the statutory rules and orders has directed them to take, that is, to board the child out with foster-parents on the foster-parents giving an undertaking to return the child if it is required.

I cannot see, under those circumstances, how this court can step in and say that as between the local authority and the foster-parents, and contrary to the wishes of the local authority, we can order the child to remain with the foster-parents. To do so would be to usurp the duties which are laid on the local authority by the Act of Parliament, and we should be substituting our own view as to what was right for the child as against the view of the local authority. It would be quite contrary to the whole tenor of Part I and Part II of the Act of 1948 for this court to assume the duty of reviewing the discretion of the local authority, and substituting their own opinion as to what was for the benefit of the child.

It appears from the affidavits that if it had not been for the view which the local authority took of their duty under section 1 (3) of the Act, they would have been quite prepared to leave this child with the foster-parents. Section 1 (3) provides: "Nothing in this section"—I think those words are quite material—"shall authorize a local authority to keep a child in "their care under this section if any parent or guardian desires "to take over the care of the child, and the local authority shall, "in all cases where it appears to them"—not "where it appears "to the court"—"consistent with the welfare of the child so to "do, endeavour to secure that the care of the child is taken over "either—(*a*) by a parent or guardian of his, or (*b*) by a relative "or friend of his, being, where possible, a person of the same "religious persuasion as the child or who gives an undertaking "that the child will be brought up in that religious persuasion."

The local authority say that the mother has told them that she wishes this child to be given over to the father; they regard that as the mother thereby saying that she desires to take over the care of the child by putting it in the care of somebody else. Speaking for myself, I think that if the mother of a child says: "I am prepared to care for my child and the method by which "I mean to do so is by putting it into the charge of someone "who will look after the child for me," that would be a taking over care of the child within the section. It seems to me that the mother could take over the care of the child by putting it in the care of a nurse, or by putting the child in an appropriate nursery school, if of tender years, or a kindergarten which was prepared to take the child on boarding terms. Section 1 (1) is dealing with children who have no one to look after them, either because their parents are dead or are unable to look after them. In other words, its purpose is to provide for care to be taken of a deserted or substantially deserted child, and to prevent it from being an abandoned child.

Section 1, if read carefully, comes to this: first, the deserted child—I use the term "deserted" as generic—is taken into the care of the local authority. If a parent then comes forward and says: "I can now look after the child because my temporary "disablement has gone," the local authority must hand the child over to the parent. If that does not happen, the local authority are to do their best to persuade the parent, or, failing that, a relative or friend, to take over the care of the child. In other words, the position seems to be this: the local authority take the child into their care. Having done that, they board it out as the statute directs, but the next thing they have to do is to give the child back to the parent's care if he can look after the child and wants to do so, or endeavour to get the parent to perform his parental duties or find a friend or relative who will do that. If the local authority think that the parent is a person who cannot be trusted to look after the child, then section 2 comes into play. Under that section the local authority can pass resolutions and go through all the machinery which is provided by the section and may thereby get complete control over the child until the child is of a certain age. By that machinery the local authority are put thoroughly in the position of in loco parentis, practically as if they had adopted the child, and are given all parental rights while the parent is deprived of those rights. That occurs where the local authority see fit to pass a resolution, and no doubt if they were satisfied or considered in all the circumstances that there would be a grave risk in letting the child go back to the mother or the father, as the case may be, they would take steps under section 2 to obtain full rights over the child to the exclusion of the parents. But where the local authority have simply acted under section 1 (1) in taking the child, and under subsection (2) in keeping it, they are not in any way depriving the parent of any rights under the section, nor can they do so.

I agree that if a parent places his child in the care and custody of another person by his or her own volition, there may be a question to be decided between the parent and the foster-parents whether the child should remain with the foster-parents or the parent, but that does not arise here. We have to see that the Act is carried out, and one thing that ought not to be altogether ignored is that while a child is in the care of the local authority, prima facie the local authority have to support and maintain it; and one does not want in these days to assist parents to get rid of their parental and financial responsibility in connexion with these children. One of the things for which section 1 (3) is providing is that a parent should be made to look after and support a child.

I put my judgment in this way: first, as the child got into the possession of the foster-parents simply by virtue of the machinery of the Children Act, 1948, and the rules, one of the statutory provisions being that the child is to be returned to the local authority if they demand it, there is no answer to the claim by the local authority when they say: "Give us back the child." Parliament did not consider, nor will this court presume, that the local authority are not proper persons to have the child back.

If the matter stayed there, I think it is irrelevant whether or not the mother wants the child handed to Mr. A. or Mr. B.

or to keep the child herself. The court has to see that the child goes back to the local authority, who have demanded its return and against whom the foster-parents cannot withhold the child.

So far as section 1 (3) is concerned, in my judgment the local authority have taken a correct view. As there was no resolution of the council under section 2, and no order of the court committing the child to the care of the local authority, and as the local authority were satisfied that the mother desired to take over the care of the child, they are bound to arrange for the mother to have the child. If she does not take care of the child, proceedings could be taken under the Act of 1948. In my view the local authority can also justify what they are doing on the ground that they know that a relative or friend, that is to say, the father, is willing to take the child. But I desire to leave the matter in the widest possible terms, and, therefore, I think that the only alteration which should be made in the order of Gerrard J. is that, while dismissing the appeal, the provision that the child be delivered by the local authority to Mr. and Mrs. X should be omitted, because if we make an order that the child be given to the local authority, that is as far as we ought to go.

HILBERY J. I agree. Mr. Simon urged that one answer to the difficulty in which he must necessarily be, as this is an application between the local authority, into whose care the child has been taken under the Act of 1948, and the foster-parents, would be to say that the local authority purported to act here under subsection (3) of section 1. He contended that in the circumstances of the case they could not act under subsection (3) as, on the admitted facts, the mother was not asking to take over the care of the child, inasmuch as she was not asking to take it over into her personal care, but to take over the care of the child and deliver it to the care and keeping of its putative father. It is necessary, therefore, I think, to look to see whether the mother's request here for the child, accompanied as it might be by a statement of her intention, was a request for the child within the terms of subsection (3). In my view, having regard to the whole tenor of the Act, it is impossible, and it would not be right, to read into the words " take over the care " the word " personal " so as to make subsection (3) read " take over into her or his personal " care." The heading of section 1, " Duty of Local Authorities " to assume care of children," throws a little light on this matter. What is the lack of care on the part of parents which will make it the duty of the local authority to assume the care of children?

Section 1 (1) provides: "Where it appears to a local authority "with respect to a child in their area appearing to them to be "under the age of seventeen—(*a*) that he has neither parent nor "guardian or has been and remains abandoned by his parents or "guardian or is lost; or (*b*) that his parents or guardian are, for "the time being or permanently, prevented by reason of mental "or bodily disease or infirmity or other incapacity or any other "circumstances from providing for his proper accommodation, "maintenance and upbringing." If, therefore, a parent was in a situation to provide for the proper accommodation, maintenance and upbringing, there would be no power in the authority to assume the care of that child, nor would it become their duty to do so.

The measure of the care which a parent is expected to provide is proper accommodation, maintenance and upbringing, and when the mother here makes her demand to take over the care of the child she is able to establish to the satisfaction of the authority, who have the statutory care of the child, that she can take over the care of that child in the sense that she is in a position to provide for its proper accommodation, maintenance and upbringing, and she can none the less provide for the proper maintenance, accommodation and upbringing of the child, though the maintenance may be provided by the putative father and his wife, and the accommodation may be in a house which is not occupied by the mother. I think one should remember as well that under the Act the local authority, in assuming the care of a child, is not only empowered, but may be said to be required, to board it out with suitable foster-parents, and that under certain regulations, when a mother proposes merely to board out her child, it does not cease to be in her case a taking over of the care of the child. There is evidence here, quite apart from that, that the local authority has indeed purported to act under the second part of section 1 (3), in addition to the first part, because the words of the affidavit in this case sworn by the children's officer follow the words of the second part of subsection (3), inasmuch as she says that she is satisfied "that it is consistent with [the child's] "welfare that she should be handed over to the mother, and "thence to [Mr. and Mrs. X], although I fully realize that the "move will almost certainly upset her for a short while."

It seems to me that having regard to the facts, this child being in the care of the local authority on the terms of the Act of 1948, and pursuant to the statutory terms imposed on the foster-parents, the foster-parents could have no possible answer to the application for the writ of habeas corpus ordering them to bring up the child and deliver it over to the local authority.

DONOVAN J. I agree. I add a few words only because of the importance of the matter and because on one point I hold a view which is entirely my own. If this were a question whether the welfare of the child would be better served by leaving it where it is, or sending it to Mr. and Mrs. X, then, like my brethren, I would answer it by saying that on the facts as disclosed by the affidavits it would be far better to leave the child where it is. But I agree that that question is not for this court to decide. I do not think that the comparative merits of the two homes emerge as a question for decision at all. The welfare of the child simpliciter certainly does; but where a local authority think it consistent with the child's welfare to hand its care over to a relative, then it can do so. Thus far, at any rate, Parliament has entrusted the welfare of the child to the local authority, and to that extent the prerogative right to secure the welfare of the child is, in my view, by necessary implication, restricted. Accordingly, there being no question of any default on the part of the local authority, the court cannot intervene simply because it may differ from the local authority as to what is best for the child.

The difficulty which this case has caused me arises from the circumstance that the local authority began these proceedings because they thought that they were bound to remove the child inasmuch as the mother herself wanted to take over the care of the child, and they seem to have prosecuted the case on that footing before Gerrard J. Were that really so, then the local authority's case would be unanswerable, for section 1 (3) would, on that basis, deprive the local authority, and consequently the foster-parents, of all rights to the child. But the mother wants the child to be handed over, not to her, but to Mr. and Mrs. X, so that it may be brought up as one of their family. Speaking purely for myself, I am unable to regard such an arrangement as a "taking care" of the child by the mother. It is argued that arranging for care to be taken is the same thing as taking care, and so in many cases it may be. But if what the mother proposes, that is, to leave to someone else every decision regarding the child's welfare, is "taking care" of the child, then she is taking care of it already, for she arranged for the child to be taken care of by the council. On that view, the first part of section 1 (3) would never come into play at all. But whatever the position

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may be, in this respect, subsection (3) goes on to impose a separate duty on the local authority to endeavour to secure, where they think it consistent with the welfare of the child, that the care of the child is taken over by, among others, a relative or friend; and the putative father is, by definition, a relative. That in fact is what the local authority is here trying to do; and once questions of what is best for the welfare of the child in such circumstances are removed from the court's jurisdiction, then clearly it cannot intervene to prevent the local authority doing what Parliament has told it to do. I agree that under this section the local authority could leave the child with the foster-parents as a " friend," within the meaning of section 1 (3). If, on the contrary, the child goes to Mr. and Mrs. X, the local authority has ample powers at its command under this and the Children and Young Persons Act, 1933, to take action to secure the future welfare of the child should it become again imperilled.

It remains only to say that since section 1 (3) requires where possible a continuance of the same religious persuasion, here this child of three obviously cannot yet have such a persuasion. For these reasons, while I could wish that the child had been left alone, and I have great sympathy with the foster-parents, I agree that the appeal must fail, subject to the order being modified as proposed.

Appeal dismissed.

Solicitors: *Stafford Clark & Co. for W. S. Mobberley & Son, Lye; Sharpe, Pritchard & Co. for W. R. Scurfield, Worcester; Edwin Coe & Calder Woods for Tree, Hemming & Johnston, Worcester.*

J. F. L.

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Mar. 15, 16, 17;
Apr. 14.

Devlin J.

PYRENE CO. LD. *v.* SCINDIA NAVIGATION CO. LD.

Shipping — Bill of lading — Loading—Hague Rules—Applicability — Goods delivered by sellers under f.o.b. contract — Contract of affreightment made by buyers—Damage to goods during loading due to negligence of shipowners—Goods not past ship's rail—Bill of lading not issued—No passing of property in goods—Whether damage occurred during " contract of carriage by sea "—Whether sellers party to contract of carriage—Exceptions—Whether available against action in tort—Shipowner entitled to limit liability— " Loaded on "—" Loading "—Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *s.* 1, *Sch. arts.* 1 (*b*) *and* (*e*), 2, 3, 4 (5).

Sale of Goods—F.O.B. Contract—Parties—Enforcement by third party. Bailment—Bald bailment. Statute—Construction—International convention—Statute based on—Ambiguity in statute—Relevance of original text of convention.

By section 1 of the Carriage of Goods by Sea Act, 1924, the Hague Rules "shall have effect in relation to and in connexion with "the carriage of goods by sea. . . ." By the Schedule to the Act, article 1 (*b*) "'Contract of carriage' applies only to contracts of "carriage covered by a bill of lading . . . in so far as such document "relates to the carriage of goods by sea" . . . (*e*) "'Carriage of "'goods' covers the period from the time when the goods are loaded "on to the time when they are discharged from the ship." By article 2 ". . . under every contract of carriage of goods by sea "the carrier, in relation to the loading, . . . and discharge of such "goods, shall be . . . entitled to the rights and immunities hereinafter set forth." By article 4 (5) "Neither the carrier nor the "ship shall . . . be . . . liable for any loss or damage to or in "connexion with goods in an amount exceeding," in effect, £200.

Sellers delivered a fire tender sold under a contract of sale f.o.b. London, alongside a ship nominated by the buyers. While the tender was being lifted on to the vessel by the ship's tackle and before it was across the rail it was dropped and damaged. Under the contract of sale the property had not then passed. All arrangements for the carriage of the goods had been made by the buyers. A bill of lading in respect of the tender had been drawn up but was not issued. The sellers sued the shipowners in tort for £966, the cost of repairing the tender. The shipowners admitted liability but claimed that the amount was limited by article 4 (5) of the Hague Rules. The sellers contended, inter alia, (1) that, as the tender had not crossed the ship's rail it was never loaded on to the ship and therefore, since the accident occurred outside the period specified in article 1 (*e*), the rules did not apply; (2) that the rules were not incorporated in the contract of carriage because no bill of lading had been issued; and (3) that even if the rules could be applied to the operation of loading at the time of the accident, they had no application as between themselves and the shipowners because they were not a party to the contract of affreightment:—

Held, (1) that the rights and liabilities under the rules did not attach to a period of time but attached to a contract or part of a contract, their operation being determined by the limits of the contract of carriage by sea, and however restricted a meaning were given to the words "carriage of goods by sea" the loading of the goods related to the carriage on the voyage and therefore was within the contract of carriage; that the reference to "loaded on" in article 1 (*e*) did no more than define the first of the operations in the series which constituted the carriage of goods by sea to which article 2 applied; that "loading" in article 2 was not confined to that stage of loading occurring after the goods had crossed the ship's rail but covered the whole operation and, accordingly, the shipowners' rights and immunities under the rules extended to the operation of loading being carried out at the time of the casualty.

(2) That whenever a contract of carriage was concluded and it was contemplated that a bill of lading would be issued in due course, that contract was from its creation "covered" by a bill of lading and was therefore, from its inception, a contract of carriage within the meaning of the rules and one to which they applied.

Harland & Wolff Ld. v. *Burns & Laird Lines Ld.*, 1931 S.C. 722; 40 Ll.L.Rep. 286 followed.

(3) That the inference should be drawn that it was the intention of all three parties that the sellers should participate in the contract of affreightment so far as it affected them, the sellers taking those benefits of the contract which appertained to their interest therein subject to whatever qualifications with regard to them that the contract imposed; that the sellers, therefore, were parties to the contract made by the buyers and were bound by the Hague Rules embodied in it and, accordingly, the shipowners were entitled, as against the sellers, to limit their liability.

Elder Dempster & Co. Ld. v. *Paterson Zochonis & Co. Ld.* [1924] A.C. 522; 40 T.L.R. 464 considered.

The Termagant (1914) 19 Com.Cas. 239; 30 T.L.R. 377 distinguished.

ACTION.

The plaintiffs, Pyrene Co. Ld., contracted to sell a number of "Pyrene" airfield tenders to the Government of India, which acted through a department known as I.S.D., for delivery f.o.b. London, the price including dock and harbour dues and port rates to be paid by the sellers. Under the contract freight was to be engaged by the buyer who was to give notice to the sellers when and on board what vessel the goods were to be delivered. I.S.D. nominated the *Jalazad*, a vessel belonging to the defendants, as the ship to be loaded under the contract of sale, and through their agents, Bahr Behrend & Co., made all arrangements for the carriage of the goods from London to Bombay. In April, 1951, the plaintiffs, in pursuance of instructions received from I.S.D., delivered the tenders at the Royal Albert Docks in the Port of London for shipment on the *Jalazad*. On April 16 the Port of London Authority delivered one of the tenders to the defendants alongside the *Jalazad*, which was lying in the docks; but while the tender was being lifted onto the vessel by the ship's tackle the mast broke and the tender, which had not crossed the ship's rail, was dropped and damaged. Under the contract of sale the property in the tender had not then passed to I.S.D. and the tender was repaired by the plaintiffs and subsequently shipped in another vessel.

No bill of lading in respect of the tender was ever issued, although one had been prepared on one of the usual forms used by the defendants which incorporated the provisions of the Carriage of Goods by Sea Act, 1924. No declaration of the nature and value of the tender was at any time made to the defendants.

The plaintiffs claimed £966 14s. 8d., the cost of repairing the tender, as damages for negligence by the defendants as bailees of the plaintiffs. The defendants admitted negligence, but they claimed that their liability was limited under article 4, rule 5, of the schedule to the Carriage of Goods by Sea Act, 1924,[1] to the sum (both parties having accepted the British Maritime Law Association Agreement of 1950) of £200.

John Megaw Q.C. and *R. A. MacCrindle* for the plaintiffs.

A. A. Mocatta Q.C. and *Michael Kerr* for the defendants. The defendants carry only under a bill of lading incorporating the Carriage of Goods by Sea Act, 1924. The Act, therefore, was incorporated into the contract of affreightment made on behalf of I.S.D. with the defendants and there was a term in that contract that the goods would be carried subject to it. It is submitted that the Act applies to the operation of loading and is not confined to the period of the voyage. That general submission is reinforced by article 2, which applies to what happened here, an accident during the process of loading, and by article 3,[2] under which a carrier's responsibilities may begin well before the goods come near the ship; see also article 3 (2), (3) and (7). There are further indications to the same effect, and references to loading, in articles 6 and 7. Too great an emphasis must not be placed on the words "loaded on" in the definition of "carriage "of goods" in article 1 (*e*); if, on the true construction of the definition the application of the Act only begins after the goods have been taken over the ship's rail, the rules are reduced to confusion. It makes no difference whether a bill of lading has, in fact, been issued or not: see *Harland & Wolff Ld.* v. *Burns & Laird Lines Ld.*[3] The last words of article 1 (*b*) refer only to charterparty cases. The French text of the Convention makes the scope of the rules clear. There is no direct authority on the meaning of loading, but in *Goodwin, Ferreira & Co. Ld.* v. *Lamport & Holt Ld.*[4] Roche J. expressed the opinion that the discharge of the goods concerned was covered by the Act, at least until the goods were unloaded into lighters. It is difficult to see why a different test should apply to loading at the other end of the contract. As between I.S.D. and the defendants, therefore, there was a loading of the tender within the Act and the defendants are entitled to the protection of article 4 (5).

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[1] Carriage of Goods by Sea Act, 1924, s. 1: "Subject to the provi-"sions of this Act, the Rules shall "have effect in relation to and in "connexion with the carriage of goods "by sea in ships carrying goods "from any port in Great Britain . . . "to any other port. . . ." Schedule 1, art. 1 (*b*): "'Contract of carriage' "applies only to contracts of carriage "covered by a bill of lading or any "similar document of title, in so far "as such document relates to the "carriage of goods by sea, including "any bill of lading, or any similar "document . . . issued under or pur-"suant to a charterparty from the "moment at which such bill of "lading or similar document of title "regulates the relations between a "carrier and a holder of the same." Article 1 (*e*): "'Carriage of goods' "covers the period from the time "when the goods are loaded on to "the time when they are discharged "from the ship." Article 2: "Risks. "Subject to the provisions of article 6, "under every contract of carriage of "goods by sea the carrier, in relation "to the loading, handling, stowage, "carriage, custody, care, and dis-"charge of such goods, shall be . . . "entitled to the rights and immuni-"ties hereinafter set forth." Article 4 (5): "Neither the carrier nor the "ship shall in any event be or become "liable for any loss or damage to "or in connexion with goods in an "amount exceeding £100 per pack-"age or unit . . . unless the nature "and value of such goods have been "declared by the shipper before ship-"ment and inserted in the bill of "lading."

By the British Maritime Law Agreement, 1950: 2. "The shipowners' "liability . . . in respect" [of all claims for loss of or damage to cargo] "shall be limited to £200 sterling . . . "per package or unit . . . (unless the "nature and value of such cargo have "been declared by the shipper before "loading and inserted in the bill of "lading)."

A shipper cannot be in any better position than the person who has made the contract of affreightment, and a seller under an f.o.b. contract, who still has the property in the goods, cannot, by suing in tort, deprive a shipowner of the protection of the Act which would be available against an f.o.b. buyer. The seller cannot avoid the terms of the contract of affreightment, for when he brings the goods alongside and they are given into the custody of the ship for loading, a bailment on terms or an implied contract is created, on the terms as to the care of the goods contained in the contract of affreightment. The plaintiffs had to put the tender on board in order to fulfil their contract of sale; they knew that they were putting goods on a ship for carriage and must have known that a bill of lading would be issued incorporating the Act. There could not have been a bald bailment since it is necessary to imply a term to give business efficacy to the transaction. A ship which has made a contract of carriage on its own terms, which include the Act, would be unlikely to agree to take the goods from someone else on a bald bailment. The ship only took the goods because a contract of carriage had been made, and it would be absurd, from a business point of view, if the ship were protected under a contract of carriage yet not protected when taking goods which it had no obligation to accept except under that contract. *Paterson Zochonis & Co. Ld.* v. *Elder Dempster & Co. Ld.*[5] is helpful on this point, for there the plaintiffs, who were not parties to a contract evidenced by a bill of lading, sought to recover from shipowners in tort. Lord Sumner there favoured a bailment on terms[6]; Viscount Cave[7] an agency approach; and Lord Finlay[7] considered that there was no independent tort, but that the goods were loaded under the contract of affreightment just as much as they were put on board under the contract of sale: see also *The Kite.*[8] In *Vita Food Products Incorporated* v. *Onus Shipping Co. Ld.*[9] Lord Wright[10] favoured a bald bailment rather than agency. See also *Gilbert Stokes & Kerr Proprietary Ld.* v. *Dalgety & Co. Ld.*[11] and *Waters Trading Co. Ld.* v. *Dalgety & Co. Ld.*,[12] where the Australian courts favoured the bailment approach. In *Collins* v. *Panama Railroad Co.*[13] the American Federal Court reached a similar conclusion.

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[2] Carriage of Goods by Sea Act, 1924, Sch. 1, art. 3: "1. The carrier "shall be bound, before and at the "beginning of the voyage, to exercise "due diligence to (*a*) make the ship "seaworthy; (*b*) properly man, equip, "and supply the ship; (*c*) make the "holds, . . . and all other parts of the "ship in which goods are carried, "fit and safe for their reception, "carriage and preservation. 2. . . . "the carrier shall properly and carefully load, handle, stow, carry, keep, "care for and discharge the goods "carried. 3. After receiving the "goods into his charge, the carrier ". . . shall . . . issue to the shipper "a bill of lading showing . . . (*a*) "The leading marks necesssary for "identification of the goods as the "same are furnished in writing by the "shipper before the loading of such "goods starts . . . (*b*) Either the "number of packages . . . or the "quantity, or weight . . . as furnished "in writing by the shipper."

[3] 1931 S.C. 722; 40 Ll.L.Rep. 286.

[4] (1929) 141 L.T. 494, 496; 45 T.L.R. 521.

The same situation arises if the case is considered on the basis of an implied contract. The same terms must be implied, as they were necessary to give business efficacy to the contract and must have been understood at the time when the goods were tendered for loading. [Reference was also made to *Fosbroke-Hobbes* v. *Airwork Ld.*[14]] The obligations of the shipowners cannot be

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[5] [1923] 1 K.B. 420; [1924] A.C. 522.

[6] [1924] A.C. 522, 564.

[7] Ibid. 534.

[8] [1933] P. 154.

[9] [1939] A.C. 277.

[10] Ibid. 300.

[11] (1948) 48 S.R.(N.S.W.) 435; 81 Ll.L.Rep. 337.

[12] [1952] S.R.(N.S.W.) 4; [1951] 2 Ll.L.Rep. 385.

[13] (1952) A.M.C. 2054; 197 Fed. (2nd) 893.

[14] [1937] W.N. 48; 53 T.L.R. 254; [1937] 1 All E.R. 108.

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increased by the fact that I.S.D. chose to arrange for the sellers to have the goods put on board. [Reference was also made to *Andrews* v. *Home Flats Ld.*[15] and *H. M. F. Humphrey Ld.* v. *Baxter, Hoare & Co. Ld.*[16]]

The defendants also rely on the fact that I.S.D., in reserving space on the *Jalazad*, were acting as the plaintiff's agents. In so far as the plaintiffs had an obligation under the contract of sale to put the goods on board, I.S.D. in booking space were acting not only for themselves but also for the plaintiffs. The plaintiffs therefore cannot disregard the terms of the contract under which the defendants agreed to accept the tender on board. Alternatively, the plaintiffs were at all material times the agents of I.S.D., or the defendants are entitled to treat them as such; I.S.D., by virtue of their contract with the plaintiffs, could not put the goods on board themselves, but could only perform their part of the contract of affreightment through the plaintiffs; had the plaintiffs not tendered the goods for shipment, I.S.D. would have been in breach of their contract with the defendants. The plaintiffs, therefore, can be in no better position than I.S.D. See, on this point, *Wimble, Sons & Co. Ld.* v. *Rosenberg & Sons*[17] and *Glengarnock Iron and Steel Co. Ld.* v. *Cooper & Co.*[18] [Reference was also made to *Collins* v. *Panama Railroad Co.*[19]]

It follows therefore that as between the plaintiffs and the defendants, the defendants are protected by article 4 (5).

John Megaw Q.C. for the plaintiffs. A bailment on terms or an implied contract between the plaintiffs and defendants was not created. The limitation of the defendants' liability was never expressly put to the plaintiffs, and in fact there was no agreement between them; that does not give rise to an implied contract. The defendants seek to set up a defence based on a contractual term against persons in no contractual relationship with them; to do that they must show that there was a contract voluntarily and freely entered into and that its terms were clear beyond the possibility of ambiguity: see the remarks of Denning L.J. in *White* v. *John Warwick & Co. Ld.*[20] A contract cannot be implied unless the circumstances were such as to make it necessary for the court to hold that it must have been the intention of both persons alleged to be parties, to enter into it. It is impossible here to say that the terms on which they are alleged to have contracted were known to the plaintiffs, even if the plaintiffs are fixed with full knowledge of the bills of lading used by the defendants. Even if the Act does apply to the whole operation of loading, the plaintiffs were not parties, nor were they intended to be parties, to the bill of lading; they cannot be affected by the terms of the bill of lading which was going to be issued, or by an implied term in the defendants' usual bill of lading. The plaintiffs were not to know that, under the terms of the contract between I.S.D. and the defendants, the tender was not to be carried on deck; if it was carried on deck the rules would not have been applicable because it would not have been "goods": see article 1 (*c*). Equally, the plaintiffs were not to know that it had been agreed that no bill of lading was to be issued but only a receipt marked as not negotiable, in which case, under article 6, the parties would have been at liberty to contract out of the rules. Further, the making of a declaration of value under article 4 (5) is a matter for the shipper, in this case I.S.D. Why should it be assumed against the plaintiffs that they knew, or ought to have known, that that declaration would not be made? The defendants are putting forward not one but several terms which might have been implied in the supposed contract.

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[15] (1945) 173 L.T. 408; [1945] 2 All E.R. 698.

[16] (1933) 149 L.T. 603.

[17] [1913] 3 K.B. 743.

[18] (1895) 22 R. 672; 32 S.L.R. 546.

[19] (1952) A.M.C. 2054.

[20] [1953] 1 W.L.R. 1285, 1293.

[DEVLIN J. If the sellers did not get the usual recognized terms they might have a complaint against the buyer.]

The sellers cannot find out the terms before the issue of the bill of lading, and the bill of lading is not issued until after shipment. The sellers are not the shippers and it is the buyer who is interested in the goods from the moment of loading and who is concerned with the rights and liabilities under the bill of lading. The plaintiffs were merely sellers putting goods on board.

[DEVLIN J. Is it reasonable to suppose that a ship would be prepared to make a second contract with the sellers?]

It is highly unlikely, but the onus is on the defendants.

[DEVLIN J. If the goods had been delivered alongside and the ship, through its negligence, sailed without the cargo, would the plaintiffs have a claim against the ship if they were sued by the buyers?]

No, but they would have a defence to a claim against them by the buyers. There is an implied term in the contract of sale that space would be available for the sellers to perform their contract.

[DEVLIN J. Suppose that the ship refused to take the goods?]

That, again, would be a defence to a claim by the buyers. The plaintiffs had no legal right to have the goods put on board, but it would have been open to them to make their own arrangements to lift the goods to the ship's rail and tender them there, or to make their own bargain; and if in such a case the terms proposed by the shipowner were unreasonable the plaintiffs would have had a complete answer to a claim by the buyers for breach of contract, because the ship selected by the buyers must be a suitable ship which would take the goods upon reasonable terms.

Elder Dempster & Co. Ld. v. *Paterson Zochonis & Co. Ld.*[21] was a totally different case because there the cargo-owner, in agreeing to the terms of a bill of lading, was agreeing that the bill of lading was a contract which should apply as between him and the owners of the vessel. *Gilbert Stokes & Kerr Proprietary Ld.* v. *Dalgety & Co. Ld.*[22] is also a different case from this.

The plaintiffs, in delivering the goods, were not agents of I.S.D., but were merely performing a term of a contract of sale in relation to goods still their own. There was no more an agency than there is when there is a contract to do something with goods before passing the legal title. A person delivering goods under a contractual obligation is not an agent.

[DEVLIN J. That turns on the same question whether there was a legal right to have the goods put on board.]

In *The Termagant*,[23] a similar case to this, it was held that the action lay in tort and not in contract, and that it was not necessary to consider the effect of a clause exempting the ship from liability.

The whole purpose of the Act and rules is to define and limit the rights and obligations between a carrier and a bill of lading holder, or one who is entitled to become the holder when the bill is issued: see *Harland & Wolff Ld.* v. *Burns & Laird Lines Ld.*[24] If it is never contemplated by the parties making the contract of affreightment that a particular person is to become a bill of lading holder the Act cannot affect that person's rights and liabilities.

[DEVLIN J. Are the United States and Australian cases wrong because they introduce a third party?]

In so far as the contracts relied on in those cases incorporated the rules.

In the present case it was never intended that the plaintiffs should hold a bill of lading, and in fact no bill of lading was ever issued in respect of the tender, because the only bill of lading contemplated was a shipped bill of lading. The contract at the

[21] [1924] A.C. 522.

[22] (1948) 48 S.R.(N.S.W.) 435; 81 Ll.L.Rep. 337.

[23] (1914) 19 Com.Cas. 239; 30 T.L.R. 377.

[24] 1931 S.C. 722; 40 Ll.L.Rep. 286.

material time, therefore, was not covered by a bill of lading and was outside the Act.

The rules, on their true construction, do not apply until the goods are across the ship's rail—are "loaded on"—and, therefore, since the contract or bailment in this case, if there was one at all, was only in relation to loading, it was not a contract of carriage within the purview of the rules, for the tender never crossed the ship's rail. Under article 1 (*b*) a contract of carriage is only a contract of carriage for the purpose of the rules in so far as the documents covering the contract relate to the carriage by sea, and article 1 (*e*) limits the period covered by the contract of carriage to the time when they are "loaded on to the time when "they are discharged from the ship." Article 2 limits the scope of the rights and immunities given by article 4 (5), and the words "in relation to the loading" apply to the time between "loading "on"—when the goods are over the ship's rail—and discharge, because that is the period which article 1 (*e*) says is meant by "carriage of goods," and do not extend to everything relating to the contract outside that period. The rights and liabilities of a carrier have always been treated as confined to a particular period shorter than the period covered by the actual contract, e.g., they do not apply where a ship holds goods in a warehouse. That period must begin when the goods reach the ship's rail, because before that they are in no sense on the ship: compare *Goodwin, Ferreira & Co.* v. *Lamport & Holt Ld.*[25] The rules must be construed in accordance with English principles, see Scrutton on Charterparties and Bills of Lading, 15th ed. (1948), p. 445, and the words "loaded on" in article 1 (*e*) should be given their natural meaning of "across the ship's rail." In the phrase "free "on board" "on" means the air space above the ship's rail. The shipowner's obligation is to take the goods at the ship's rail and his responsibilities start then: *Harris* v. *Best, Ryley & Co.*[26] See also *Wimble, Sons & Co. Ld.* v. *Rosenberg & Sons.*[27] It is significant that it is at the ship's rail that the ownership of goods changes under an f.o.b. contract. [Reference was also made to *Argonaut Navigation Co. Ld.* v. *Ministry of Food,*[28] *Transoceanica Societa Italiana Di Navigazione* v. *H. S. Shipton & Sons*[29] and *Glengarnock Iron and Steel Co. Ld.* v. *Cooper & Co.*[30]]

The court is bound by the words used by the legislature, and it is improper to look at the French text of the convention: compare *Horabin* v. *B.O.A.C.*[31] The purpose of the words "and "in connexion with the carriage of goods by sea" in section 1 of the Act of 1924 is to indicate the particular voyages to which the terms of the Convention are to be made applicable. The Act is an embodying Act, and section 1 should not be construed so as to apply the rules to events outside the scope of the Convention unless there are clear words showing legislative alteration of the Convention. The accident here occurred at a time and in relation to a matter outside the "contract of carriage" and neither the rules nor the immunity given by article 4 (5) apply.

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[25] (1929) 141 L.T. 494; 45 T.L.R. 521.

[26] (1892) 68 L.T. 76; 9 T.L.R. 149.

[27] [1913] 3 K.B. 743.

[28] [1949] 1 K.B. 572.

[29] [1923] 1 K.B. 31.

[30] 22 R. 672; 32 S.L.R. 546.

A. A. Mocatta Q.C. in reply. The principle stated by Denning L.J. in *White* v. *John Warwick & Co. Ld.*[32] is too wide and cannot apply to an implied contract. An f.o.b. seller putting goods on board ship discharges vis-à-vis the ship the obligations of the buyer. [Reference was made to *Vita Food Products Incorporated* v. *Unus Shipping Co. Ld.*,[33] *Andrews* v. *Home Flats Ld.*[34] and *Fosbroke-Hobbes* v. *Airwork Ld.*[35]] The facts in *The Termagant*[36] were quite distinct; it is inconsistent with *Elder Dempster & Co. Ld.* v. *Paterson Zochonis & Co. Ld.*,[37] and was distinguishable from that case and the Australian cases and is no longer good law. [Reference was also made to *Lickbarrow* v. *Mason.*[38]] If there is an implied contract or a bailment on terms the Act applies by implication: see *Golodetz* v. *Kerstein, Hunik & Co.*[39] The argument that the Act does not apply because there was no shipped bill of lading is inconsistent with the principles in *Harland & Wolff Ld.* v. *Burns & Laird Lines Ld.*[40]

The rules cannot be limited to any particular period. There is a period depending on articles 1 and 7 during which, if damage occurs to the goods, neither side can escape the rules. That period may begin at the ship's rail, but the rules may also have application to events falling within their words before that period. Whatever the meaning of "loaded," the words "in relation to "the loading" in article 2 are wide enough to cover the whole operation of loading, including the lifting to the ship's rail and, unless there is an express agreement departing from it, article 4

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[31] [1952] W.N. 519; [1952] 2 All E.R. 1016.

[32] [1953] 1 W.L.R. 1285.

[33] [1939] A.C. 277.

[34] (1945) 173 L.T. 408; [1945] 2 All E.R. 698.

[35] [1937] W.N. 48; 53 T.L.R. 254; [1937] 1 All E.R. 108.

[36] 19 Com.Cas. 239; 30 T.L.R. 377.

[37] [1924] A.C. 522.

[38] (1794) 5 Term Rep. 683.

[39] (1926) 24 Ll.L.Rep. 374.

[40] 1931 S.C. 722.

(5) applies. The construction should be approached from the angle of giving effect to the Convention and not from that of previous cases in English law. There is no justification for dividing the operation of loading into two halves at the ship's rail.

Cur. adv. vult.

April 14. DEVLIN J. read the following judgment: This case raises questions of interest and importance upon the interpretation of the Hague Rules and their applicability to a f.o.b. seller. The plaintiffs sold a piece of machinery, a fire tender, to the Government of India (which acted in this matter through a department known for short as I.S.D.) for delivery f.o.b. London. I.S.D. nominated the *Jalazad*, one of the defendants' vessels, as the ship to be loaded under the contract of sale, and through their agents, Bahr Behrend & Co., made all the arrangements for the carriage of the goods. While the tender was being lifted on to the vessel by the ship's tackle, and before it was across the rail it was, through the fault of the ship, dropped and damaged. Under the contract of sale the property had not then passed to I.S.D. The damage to the tender cost £966 to repair and the plaintiffs sue for that sum. The defendants admit liability but claim that the amount is limited under article 4, rule 5, of the Hague Rules. The limit stated in that rule is £100, but this is subject to article 9 which prescribes that the figure is to be taken to be gold value. There are doubts about the interpretation and effect of this latter article, and they have been very sensibly resolved for the parties to this case by the acceptance of the British Maritime Law Association's Agreement of August 1, 1950, which fixes the limit at £200.

It is therefore for the defendants to establish that they are entitled to limit their liability. To do this they must show privity of contract between themselves and the plaintiffs, that the contract incorporated the rules, and that the rules are effective to limit their liability. The plaintiffs dispute all these points: they claim in tort for the damage done to their goods.

The fire tender was not the only piece of machinery supplied by the plaintiffs for shipment on board this ship, though it was the only piece which was damaged before shipment. A bill of lading had been prepared to cover the whole shipment; and it was issued to I.S.D. in due course but with the fire tender deleted from it. The bill of lading incorporated the Hague Rules and was subject to their provisions, as by the Carriage of Goods by Sea Act, 1924, s. 3, it was bound to be. It is not disputed that in this case, as in the vast majority of cases, the contract of carriage was actually created before the issue of the bill of lading which evidences its terms.

I think it is convenient to begin by considering the effect of the rules, for Mr. Megaw contends that even if a bill of lading covering the fire tender had been issued incorporating the rules the holder of the bill would not be subject to immunity in respect of an accident occurring at this stage of the loading. If this is so, it disposes of the defendants' plea. If it is not so, I shall have to consider whether the rules affect the contract of affreightment when no bill of lading is issued, and whether the plaintiffs were a party to that or any similar contract.

Mr. Megaw's argument turns upon the meaning to be given to article 1 (*e*), which defines "carriage of goods" as covering "the period from the time when the goods are loaded on to the "time when they are discharged from the ship." Mr. Megaw says that these goods never were loaded *on* to the ship. In a literal sense obviously they were not. But Mr. Megaw does not rely on the literal sense; there are rules which could hardly be made intelligible if they began to operate only after the goods had been landed on deck. He treats the word "on" as having the same meaning as in "free on board"; goods are loaded on the ship as soon as they are put across the ship's rail, which the tender never was. He submits that the rule (which, of course, has effect in English law only by virtue of its place in the Schedule to the Carriage of Goods by Sea Act, 1924) must be construed in accordance with English principles. He relies upon *Harris* v. *Best, Ryley & Co.*[1] and *Argonaut Navigation Co. Ld.* v. *Ministry of Food*,[2] which lay down the rule that loading is a joint operation, the shipper's duty being to lift the cargo to the rail of the ship (I shall refer to that as the first stage of the loading), and the shipowner's to take it on board and stow it (I shall refer to that as the second stage).

Mr. Megaw contends, therefore, that the accident occurred outside the period specified in article 1 (*e*). So, he says, article 4, rule 5 (which limits liability), and, indeed, all the other rules which regulate the rights and responsibilities of the shipowner, do not apply. They are made applicable by article 2, which provides that "under every contract of carriage of goods "by sea the carrier, in relation to the loading, handling, stowage,

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[1] (1892) 68 L.T. 76.

[2] [1949] 1 K.B. 572.

" carriage, custody, care and discharge of such goods, shall be " subject to the responsibilities and liabilities, and entitled to the " rights and immunities hereinafter set forth." " Contract of " carriage " is defined in article 1 (*b*); the term " applies only " to contracts of carriage covered by a bill of lading or any similar " document of title, in so far as such document relates to the " carriage of goods by sea." Then it is paragraph (*e*) of this article 1 which contains the definition of " carriage of goods " on which Mr. Megaw relies. It is in this way, he argues, that if the casualty does not fall within the period covered by this last definition the rules do not apply to it.

In my judgment this argument is fallacious, the cause of the fallacy perhaps lying in the supposition inherent in it that the rights and liabilities under the rules attach to a period of time. I think that they attach to a contract or part of a contract. I say " part of a contract " because a single contract may cover both inland and sea transport; and in that case the only part of it that falls within the rules is that which, to use the words in the definition of " contract of carriage " in article 1 (*b*), " relates " to the carriage of goods by sea." Even if " carriage of goods " by sea " were given by definition the most restricted meaning possible, for example, the period of the voyage, the loading of the goods (by which I mean the whole operation of loading in both its stages and whichever side of the ship's rail) would still *relate* to the carriage on the voyage and so be within the " contract of carriage."

Article 2 is the crucial article which for this purpose has to be construed. It is this article that gives the carrier all his rights and immunities, including the right to limit his liability. He is entitled to do that " in relation to the loading " and " under " every contract of carriage." Now I shall have to consider later the meaning of " loading " in article 2 and whether it is such as to exclude what I have called the first stage, that is, the operations on the shore side of the ship's rail. For the moment I am concerned only to see whether its meaning is cut down by the definition in article 1 (*e*) on which Mr. Megaw relies. The only phrase in article 2 that can cut it down is the one I have quoted: " under every contract of carriage "; it is only in so far as article 1 (*e*) operates through the definition of " contract " of carriage " that it can have any effect on article 2. I have already sought to demonstrate that, however limited the period in article 1 (*e*) may be, the loading in both its stages must still *relate* to it and so be within the definition of contract of carriage.

A precise construction of article 1 (*e*), while not irrelevant, is in no way conclusive of the point I have to decide, which turns, I think, upon the meaning of " loading " in article 2.

But before I try to elucidate that, let me state my view of article 1 (*e*). For, as I have said, though not dominant, it is not irrelevant; in construing " loading " in article 2 you must have regard to similar expressions throughout the rules, article 1 (*e*) included. In my judgment, no special significance need be given to the phrase " loaded *on*." It is not intended to specify a precise moment of time. Of course, if the operation of the rules began and ended with a period of time a precise specification would be necessary. But they do not. It is legitimate in England to look at section 1 of the Act, which applies the rules not to a period of time but " in relation to and in connexion " with the carriage of goods by sea." The rules themselves show the same thing. The obligations in article 3, rule 1, for example, to use due diligence to make the ship seaworthy and man and equip her properly are independent of time. The operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of article 1 (*e*) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed perhaps by a period of sea transport and then again by a period of inland transport. Discharging from rail at the port of loading may fall into the first period; loading on to the ship into the second. The reference to " when the goods are loaded on " in article 1 (*e*) is not, I think, intended to do more than identify the first operation in the series which constitutes the carriage of goods by sea; as " when they are discharged " denotes the last. The use of the rather loose word " cover," I think, supports this view.

There is another reason for thinking that it would be wrong to stress the phrase " loaded on " in article 1 (*e*). It is no doubt necessary for an English court to apply the rules as part of English law, but that is a different thing from assuming them to be drafted in the light of English law. If one is inquiring whether " loaded *on* " in article 1 (*e*) has a different meaning from " loaded " or " loading " in other parts of the rules, it would be mistaken to look for the significant distinction in the light of a conception which may be peculiar to English law. The idea of the operation being divided at the ship's rail is certainly not a universal one. It does not, for example, apply in Scotland: *Glengarnock Iron and Steel Co. Ld.* v. *Cooper & Co.*,[3] *per* Lord Trayner.[4] It is more reasonable to read the rules as contemplating loading and discharging as single operations. It is no doubt possible to read article 1 (*e*) literally as defining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why exclude loading from the period and include discharging? How give effect to the frequent references to loading in other rules? How reconcile it with article 7 which allows freedom of contract "prior to the loading on and subsequent to the discharge from"? Manifestly both operations must be included. That brings me back to the view that article 1 (*e*) is naming the first and last of a series of operations which include in between loading and discharging, "handling, stowage, carriage, custody and care." This is, in fact, the list of operations to which article 2 is by its own terms applied. In short, nothing is to be gained by looking to the terms of article 1 (*e*) for an interpretation of article 2.

I think, therefore, that article 1 (*e*), which was the spearhead of Mr. Megaw's argument, turns out to be an ineffective weapon. But that still leaves it necessary to consider the meaning of "loading" in article 2. Just how far does the operation of loading, to which article 2 grants immunity, extend? Now I have already given reasons against presuming that the framers of the rules thought in terms of a divided operation, and in the absence of such a presumption the natural meaning of "loading" covers the whole operation. How far can that be pressed? Article 3, rule 2, for example, provides: "the carrier shall "properly and carefully load," etc. If "load" includes both stages, does that oblige the shipowner, whether he wants to or not, to undertake the whole of the loading? If so, it is a new idea to English lawyers, though perhaps more revolutionary in theory than in practice. But if not, and "load" includes only the second stage, then should it not be given a similar meaning in article 2 with the result that immunity extends only to the second stage?

There is, however, a third interpretation to article 3, rule 2. The phrase "shall properly and carefully load" may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language

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[3] (1895) 22 R. 672.

[4] Ibid. 676.

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more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in Carver's Carriage of Goods by Sea, 9th ed. (1952), p. 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.

I reject the interpretation of loading in article 2 as covering only the second stage of the operation. Such authority as there is is against it. If loading under the rules does not begin before the ship's rail, by parity of reasoning discharging should end at the ship's rail; but so to hold would be contrary to the decision of Roche J. in *Goodwin, Ferreira & Co. Ld.* v. *Lamport & Holt Ld.*[5]

Since the shipowner in this case in fact undertook the whole operation of loading it is unnecessary to decide which of the other two interpretations is correct. I prefer the more elastic one, that which I have called the third. There appears to be no binding authority on the point. I have noted the view expressed in Carver; on the other hand, Temperley's Carriage of Goods by Sea Act, 1924, 4th ed. (1932), p. 26, and Scrutton on Charter-parties and Bills of Lading, 15th ed. (1948), p. 160, consider that the carrier is responsible for the whole of the loading. However, it is sufficient for me to say that on the facts of this case the rights and immunities under the rules extend to the whole of the loading carried out by the defendants and, therefore, Mr. Megaw's first point fails.

I think, if I may so put it, that it is a good thing that it should fail. There must be many cases of carriage to which the rules apply where the ship undertakes the whole of the loading and discharging; and it would be unsatisfactory if the rules governed all but the extremities of the contract. It so happens that in this case (rather unusually) the exemption of the extremities would benefit the shipper. For the form of bill of lading which would have applied is made subject to the rules simpliciter, and does not set out the traditional mass of clauses which the rules have rendered generally ineffective. If they were there the shipper would probably fare worse under them than under the rules. It would certainly be a triumph for the innate conservatism of those who have not scrapped their small print if, though only on the outer fringes, it was to come into its own. But the division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth-century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.

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[5] (1929) 141 L.T. 494.

The next contention on behalf of the plaintiffs is that the rules are incorporated in the contract of carriage only if a bill of lading is issued. The basis for this is in the definition of article 1 (*b*) of "contract of carriage"; I have already quoted it, and it "applies only to contracts of carriage covered by a "bill of lading." The use of the word "covered" recognizes the fact that the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intend the terms of the contract to be changed when the bill of lading is issued: for the issue of the bill of lading does not necessarily mark any stage in the development of the contract; often it is not issued till after the ship has sailed, and if there is pressure of office work on the ship's agent it may be delayed several days. In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply. There is no English decision on this point; but I accept and follow without hesitation the reasoning of Lord President Clyde in *Harland & Wolff Ld.* v. *Burns & Laird Lines Ld.*[6]

Mr. Megaw contends that the parties in this case contemplated a shipped bill of lading and, therefore, that they intended the application of the rules to the contract to be conditional upon the issue of a shipped bill. No doubt the parties contemplated a shipped bill of lading. But then they also contemplated a shipment. When no shipment took place there was nothing in this contract, I think, to prevent the shipper from demanding under article 3, rule 3, a "received for shipment" bill if it were of any use to him. Mr. Megaw's point, I think, is that if a bill of lading as contemplated is issued, the terms of it (including the rules) operate retrospectively; if the bill is not issued, the terms do not come into operation at all. But I can see no reason for treating the bill of lading differently from any other formal contractual document. If the agreement was made "subject to" bill of lading there would be room for Mr. Megaw's argument; but there would also be no legal contract at all until the bill of lading was issued, and it is not suggested that this is the case here.

I have now arrived at the conclusion that the rules apply to the contract between the defendants and I.S.D. so as to entitle the defendants, if they were sued by I.S.D., to limit their liability. The plaintiffs' last contention is that they were not a party to the contract between the defendants and I.S.D. or to any similar contract; and that, even if they were, the limitation would not apply to them.

It is convenient to take the last part of this contention first, for it raises only a short point. Even if, so it is argued, the plaintiffs were a party to the contract made by I.S.D. and the rules were a part of the contract, the rules could not affect the plaintiffs; for by their own terms they regulate only the relations between the carrier and the holder of the bill of lading and the plaintiffs were never holders of the bill of lading.

Article 2 grants rights to and imposes responsibilities upon the carrier "under any contract of carriage." Prima facie those rights and responsibilities must be against or towards every other party to the contract. But, so it is contended, "contract of "carriage" by its definition excludes all parties except the carrier and the holder of the bill of lading. This contention derives from the concluding words of article 1 (*b*) "from the "moment at which such bill of lading or similar document of "title regulates the relations between a carrier and a holder "of the same." In my judgment, those words do not apply to bills of lading generally but only to bills of lading issued under a charterparty; and even then they are intended to define not the parties to the contract but the moment at which the bill of lading becomes a contractual document within the meaning of the rules. I base this conclusion upon the sense of the paragraph as a whole as well as upon its punctuation. If there is any doubt the French text (set out in Carver, 9th ed., p. 1065) makes it quite clear. Having regard to the preamble to the Act and the fact that the French text is the only authoritative version of the Convention, I think, notwithstanding Mr. Megaw's objection, that it is permissible to look at it. I agree that it is not conclusive, but it may help to solve an ambiguity if there be one. I agree also that unless the court is assisted by a French lawyer it should be looked at cautiously; but the appreciation of this particular point needs no more French than every schoolboy knows, and I think it would be pedantic to ignore it.

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[6] 1931 S.C. 722.

I come next to the question whether the plaintiffs are privy to the contract of carriage. A similar question has arisen before in relation to stevedores and other agents of the carrier. If the carrier employs a third party, such as stevedores, to perform part of his duties under the contract of carriage, can the third party claim the protection of the contract; or can the shipper, if his goods are damaged, sue the third party in tort? The point arose in *Elder Dempster & Co. Ld.* v. *Paterson Zochonis & Co. Ld.*[7] The bill of lading was issued on behalf of time charterers; but the goods were handled and damaged by the crew who were servants of the shipowner. The charterers were protected by exceptions in the bill of lading; but the shipper claimed to sue the shipowner in tort for the action of his servants. The claim failed. Scrutton L.J.[8] in the Court of Appeal, and Viscount Cave,[9] put it on the ground of agency: the charterer in entering into the contract of carriage acted on behalf and for the benefit of those others who might be given duties to perform under it. There is in the case another ratio decidendi which I shall note later; but recently Denning L.J. in *White* v. *John Warwick &*

[7] [1924] A.C. 522.

[8] [1923] 1 K.B. 420, 441.

[9] [1924] A.C. 522, 534.

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Co. Ld.,[10] preferred the view I have just stated. *Elder Dempster & Co. Ld.* v. *Paterson Zochonis & Co. Ld.*[11] was not concerned with exceptions or immunities in the Hague Rules, but the principle is the same. Two New South Wales cases, *Gilbert Stokes and Kerr Proprietary Ld.* v. *Dalgety & Co. Ld.*,[12] and *Waters Trading Co. Ld.* v. *Dalgety & Co. Ld.*,[13] and one United States case, *Collins & Co.* v. *Panama Railroad Co.*,[14] have been concerned with the Hague Rules and have allowed stevedores to claim the benefit of them. In the last of the three the majority judgment in the United States Court of Appeals applied [15] the law as set out in the Restatement of the Law, tit. Agency, s. 347: "An agent who is acting in pursuance of his "authority has such immunities of the principal as are not "personal to the principal." (Incidentally, if these decisions are right, they are inconsistent with the argument I last dealt with, that the rules apply only as between the carrier and the holder.) All these people were on the carrier's side; they were his privies and came into the contract under his aegis. In the case I have to consider the third party is on the shipper's side; if he was privy to the contract it was the act of the shipper that made him so. If he was privy to it he cannot, of course, take the benefits without the burdens, or enforce liability without limitation if the contract gives limitation.

There is nothing novel about the idea of a third party coming in to enforce a contract either as an undisclosed principal or as a beneficiary. Denning L.J., in *Smith and Snipes Hall Farm Ld.* v. *River Douglas Catchment Board*,[16] reviews the main categories into which such third parties commonly fall. The principle is very familiar in mercantile contracts: *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ld.*[17] is an example given by Denning L.J. arising out of a charterparty. It is a principle which has constantly to be invoked where the property in the subject-matter of the contract is likely to be transferred during the currency of the contract. In marine insurance the policy is always expressly taken out for the benefit of those to whom the property "doth, may or shall appertain." In non-marine insurance there is no set form, but similar words

[10] [1953] 1 W.L.R. 1285, 1293; [1953] 2 All E.R. 1021.

[11] [1924] A.C. 522.

[12] (1948) 48 S.R.(N.S.W.) 435; 81 Ll.L.Rep. 337.

[13] [1952] S.R.(N.S.W.) 4; [1951] 2 Ll.L.Rep. 385.

[14] (1952) A.M.C. 2054; 197 Fed. (2nd) 893.

[15] A.M.C. 2054, 2059.

[16] [1949] 2 K.B. 500, 514, 515; 65 T.L.R. 628; [1949] 2 All E.R. 179.

[17] [1919] A.C. 801; 35 T.L.R. 542.

may produce the same result: see, for example, *Waters* v. *Monarch Fire and Life Assurance Co.*[18] In bills of lading the indorsement of the bill passes the title to the goods by virtue of the custom of merchants, as found in *Lickbarrow* v. *Mason*,[19] but did not at common law transfer the benefit of the contract of carriage. The Bills of Lading Act, 1855, s. 1, gives the indorsee or named consignee a statutory right to sue; the Judicature Act, 1873, s. 25 (6), later performed the same function for the assignee under the ordinary contract. But just as before 1873 the assignee could always sue in the name of the assignor, so before 1855 the consignee could sue in the name of the consignor. The principle was described by Lord Blackburn in his Contract of Sale, 3rd ed. (1910), pp. 422 and 423, as follows (the language quoted is Lord Blackburn's, written before 1855): "Even if the assignee of the bill of lading had acquired the full "legal and equitable property in the goods, so that the damage "arising from the non-delivery was exclusively his, still he was "compelled to bring any action on the contract in the name of "the original contractor as his trustee; for, in general, contracts "do not by the law of England run with goods, and no custom "has ever been recognized making the contract contained in a "bill of lading an exception." The author continues: "If, "however, the goods when shipped are not the property of the "shipper, he in general acts in shipping them as agent for the "owner of the goods." *Sargent* v. *Morris*[20] is an authority on this point.

In this type of case the seller as shipper makes the contract for the benefit of the buyer. The converse may be equally true. There is no difficulty in principle about the concept of an f.o.b. buyer making a contract of affreightment for the benefit of the seller as well as for himself. But it is necessary that I should examine in greater detail than I have hitherto done the circumstances in which the contract was made in order to determine whether the inference of agency can properly be drawn from them.

The contract of sale provided for delivery f.o.b. London, the price including dock and harbour dues and port rates to be paid by the seller; and further expressly provided that freight was to be engaged by the buyer, who was to give due notice to the seller when and on board what vessel the goods were to be delivered. Payment was to be made twenty-one days after delivery and after

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[18] (1856) 5 E. & B. 870.

[19] (1794) 5 Term Rep. 683.

[20] (1820) 3 B. & Ald. 277.

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receipt of certain documents for which the contract called, such as invoice, inspection certificate, etc., and of the dock company's or mate's receipt. In the special circumstances of this case and because of delay in shipment, payment was in fact made in advance, but on the terms that that should not affect the seller's obligations as to delivery. As I have said, it was agreed that the property did not pass till delivery over the ship's rail.

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It is worth noting that the problem which I have to consider does not arise as a matter of course in every f.o.b. contract. The f.o.b. contract has become a flexible instrument. In what counsel called the classic type as described, for example, in *Wimble, Sons & Co. Ld.* v. *Rosenberg & Sons*,[21] the buyer's duty is to nominate the ship, and the seller's to put the goods on board for account of the buyer and procure a bill of lading in terms usual in the trade. In such a case the seller is directly a party to the contract of carriage at least until he takes out the bill of lading in the buyer's name. Probably the classic type is based on the assumption that the ship nominated will be willing to load any goods brought down to the berth or at least those of which she is notified. Under present conditions, when space often has to be booked well in advance, the contract of carriage comes into existence at an earlier point of time. Sometimes the seller is asked to make the necessary arrangements; and the contract may then provide for his taking the bill of lading in his own name and obtaining payment against the transfer, as in a c.i.f. contract. Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight has to be paid in advance this method may be the most convenient. In such a case the seller discharges his duty by putting the goods on board, getting the mate's receipt and handing it to the forwarding agent to enable him to obtain the bill of lading. The present case belongs to this third type; and it is only in this type, I think, that any doubt can arise about the seller being a party to the contract.

The contract of carriage in this case was made in the office of Bahr Behrend & Co., for they are both agents for I.S.D. and freight brokers for the defendants. An instruction came to Bahr Behrend from I.S.D. to arrange for the shipment of these goods among other cargo, and a note by Bahr Behrend dated March 29, 1951, records that the shipment was booked per the *Jalazed*. The ordinary practice is for I.S.D. to prepare a bill of lading

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[21] [1913] 3 K.B. 743.

(the defendants have a special form for Government of India shipments) and to send it to Bahr Behrend. Bahr Behrend check the items on it from a return made out by the cargo superintendent after shipment and then sign and issue the bill of lading on behalf of the defendants generally some days after the ship has sailed, dependent on the volume of the cargo to be dealt with.

It is the practice in the Port of London for all loading to be done by the port authority at the ship's expense. The whole charge, therefore, for loading from alongside is paid by the ship and covered by the freight; in this case, it included the cost of lighterage from the dock to the ship's side. On April 7 Bahr Behrend, on behalf of I.S.D., notified the plaintiffs that space had been engaged, and instructed them to dispatch the goods to arrive alongside the vessel.

The question at once arises: if, as the plaintiffs contend, there is no contractual relationship between them and the defendants, how do they get these goods on board? If the ship sails off without loading the goods the plaintiffs are in breach of their contract of sale. Have they no redress against the ship? Mr. Megaw argues that they would have none, and that vis-à-vis the sellers the ship in loading acts as a volunteer. This seems to me to be a position which none of the three parties would have accepted for a moment.

Let me look at the situation first from the standpoint of the shipper, I.S.D. In the ordinary case, such as I have been considering above, where the shipper takes out a bill of lading or an insurance policy, he has at the time of the contract himself got the property in the goods; the question whether he contracts for the benefit of subsequent owners depends on proof of his intention at the time of contracting. But where, as in this case, he has not got the property at the time of the contract, and does not intend to acquire it before the contract begins to operate, he must act as agent. He cannot intend otherwise; the intention is inherent in the act; he must either profess agency or confess himself a wrongdoer. For if the shipowner lifts the seller's goods from the dock without the seller's authority he is guilty of conversion to which the shipper, by requiring him to do it, makes himself a party.

Let me look at it now from the standpoint of the ship. If the shipowners were sued for conversion they would surely have redress against the shipper. A person who requests a carrier to handle goods must have the right to deal with them or it would not be safe to contract with him. A shipowner cannot be supposed to inquire whether the goods he handles do or do not belong to the shipper who entrusts them to his care; if the goods are not the shipper's there must be implied a warranty of authority by him that he has the right to contract with regard to them.

Then from the standpoint of the seller, if his goods are left behind, and it is said to him: "You made no contract with the "ship; what else did you expect?" he would answer, I think, that he naturally supposed that all the necessary arrangements had been made by the shippers.

In brief, I think the inference irresistible that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him. If it were intended that he should be a party to the whole of the contract his position would be that of an undisclosed principal and the ordinary law of agency would apply. But that is obviously not intended; he could not, for example, be sued for the freight. This is the sort of situation that is covered by the wider principle; the third party takes those benefits of the contract which appertain to his interest therein, but takes them, of course, subject to whatever qualifications with regard to them the contract imposes. It is argued that it is not reasonable to suppose that the seller would submit to the terms of a contract whose detail he does not know and which might not give him the sort of protection of which he would approve. I do not think that as a matter of business this is so. Most people board a bus or train without considering what protection they will get in the event of an accident. I see nothing unreasonably imprudent in a seller assuming that the buyer, whose stake in the contract is greater than his, would have obtained whatever terms are usual in the trade; if he were legally minded enough to inquire what they were, the answer would be that by statutory requirement the contract was governed by the Hague Rules.

If this conclusion is wrong, there is an alternative way by which, on the facts of this case, the same result would be achieved. By delivering the goods alongside the seller impliedly invited the shipowner to load them, and the shipowner by lifting the goods impliedly accepted that invitation. The implied contract so created must incorporate the shipowner's usual terms; none other could have been contemplated; the shipowner would not contract for the loading of the goods on terms different from those which he offered for the voyage as a whole. This simple solution was the one which Lord Sumner preferred in *Elder Dempster & Co. Ld.* v. *Paterson Zochonis & Co. Ld.*,[22] and which was adopted in respect of the stevedores' liability in the cases I have mentioned. But, as I have said, the problem in those cases was a rather different one, and I do not think that the solution fits so well the circumstances of this case. First, it means that if the goods were not lifted there would be no contract; and while that does not arise in this case, a solution that leaves it in the air is not so acceptable as one that covers it. Secondly, I find it difficult to infer that the shipowner by lifting the goods intended to make any new contract; he would not know where the property in the goods lay; I think he must have supposed that he was acting under a contract already made through Bahr Behrend, and on the assumption that Bahr Behrend had authority to make it. Thirdly, I doubt whether the seller intended to make any separate contract when he sent down the goods; I think that he, too, would have supposed that they would be dealt with under the contract of affreightment. But while I do not accept this as the right solution, I think it is preferable to the alternative of a "bald bailment" which Lord Sumner rejected in *Elder Dempster & Co. Ld.* v. *Paterson Zochonis & Co. Ld.*,[23] and for which Mr. Megaw is, in effect, contending in this case.

Teenage *The Termagant*,[24] which Mr. Megaw cited, is not in my view an authority that goes beyond its facts. In that case the plaintiffs obtained from the Union Castle Line a through bill of lading for cargo from Port Natal to Glasgow. The bill of lading gave liberty to tranship "at the company's expense . . . but at "merchant's risk." The cargo was unloaded in the Thames on to a barge belonging to the defendants, which was to take it to a coasting steamer to carry it to Glasgow; the contract made between the Union-Castle Line and the barge included the London Lighterage Clause with its comprehensive exceptions. The barge sank and the cargo was lost and the cargo-owners as plaintiffs sued the barge-owners as defendants. They seem to have put their case primarily in contract and only alternatively in tort. They alleged a contract to be inferred from the receipt of the goods and a breach of duty thereunder. They were probably not very frightened of the London Lighterage Clause because they alleged that the barge was unseaworthy, and doubtless relied upon that fact to displace the exceptions in the clause;

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[22] [1924] A.C. 522.
[23] Ibid. 564.
[24] (1914) 19 Com.Cas. 239.

on the other hand, they seemed doubtful about relying on unseaworthiness as a tort. The main defence was that the plaintiffs had no privity of contract with the defendants. The plaintiffs replied that the Union-Castle were acting as their agents in putting the goods on the barge; that they (the plaintiffs) were therefore parties to the contract with the barge. Alternatively, the plaintiffs argued that if there was no contract they could succeed in tort. Bargrave Deane J. found for the plaintiffs in tort on their alternative contention, saying that [25] "the barge "owners have been guilty of a tort in supplying a vessel which "was dangerous for the purpose for which it was supplied." He held that there was no contract between the plaintiffs and the barge owners.

It is obvious that a through bill of lading necessarily contemplates that the first carriers will not perform the whole of the contract; they must, therefore, have implied authority to tranship the goods at some point in the voyage and send them forward by another carrier. But it does not follow from that that they have any authority from the shipper to make on his behalf a special contract with the second carrier. Prima facie the second carrier is, I should have thought, discharging on behalf of the first carrier the duties which the first carrier has undertaken in the through bill of lading shall be performed; there is, of course, no reason why a person who has not undertaken to discharge his contractual duties personally should not delegate them to someone else. The position, therefore, of the second carrier in relation to the shipper would appear to be very much the same as that of the stevedores in relation to the cargo owner in the United States and Australian cases I have referred to.

At any rate, it is, I think, plain that the first carrier would not, in the absence of express words, have any authority from the shipper to make a contract with the second carrier on the shipper's behalf in terms less favourable to the shipper than those contained in the through bill. In *The Termagant*[26] the through bill contained the term I have already recorded, "liberty to "tranship at merchant's risk." Whether this is sufficient authority may be doubtful; and in particular, whether it permits the first carrier to subject the shipper to the London Lighterage Clause; it is difficult to know quite how far it goes: see *The Galileo*,[27] *per* Lord Sumner.[28] I do not think that the decision

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[25] 19 Com.Cas. 239, 245.

[26] 19 Com.Cas. 239.

[27] (1913) 19 Com.Cas. 44.

[28] Ibid. 58.

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Devlin J.

of Bargrave Deane J.[29] therefore helps at all in the point I have to consider. The circumstances of his case did not, for the reasons I have given, give rise to any implication that the first carrier had any authority to contract with the barge on behalf of the shippers, who were the owners of the property. Whether or not there was any express authority depends upon the construction of the bill of lading in that case.

In my judgment the plaintiffs are bound by the Hague Rules as embodied in the contract of carriage and, accordingly, can recover no more than £200. There will be judgment for them for that sum.

Judgment for the plaintiffs.

Solicitors: *Hair & Co.; Holman, Fenwick & Willan.*

J. F. L.

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[29] 19 Com.Cas. 239.

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1954
June 25.

Singleton, Denning and Morris L.JJ.

SHAW *v.* SHAW AND ANOTHER.

[1953 S. 1833.]

Husband and Wife—Marriage—Breach of promise—Promise by married man—Ceremony of marriage—Woman unaware of previous marriage—Implied warranty—Public policy—Death of man intestate—Measure of damages—Accrual of causes of action—Fraud—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2 (1), 26 (*b*).

Damages—Law Reform Act, 1934. *Death—Personal action—Effect on. Limitation of action. Contra bonos mores.*

In 1937, S., a married man, representing himself as being a widower, went through a form of marriage with the plaintiff. In 1950 his legal wife died, and in 1952 he himself died intestate. After S. died the plaintiff became aware for the first time that she had not been legally married to him and she brought an action against the administrators, a son and a daughter of the deceased, claiming damages for breach of promise of marriage by the deceased:—

Held, (1) that there was a continuing breach of the implied warranty given with the promise of marriage that S. was in a position to marry. There was also a breach of the promise to marry, for that promise could have been implemented in 1950 when the legal wife died.

(2) That the claim was not excluded on grounds of public policy, because the plaintiff did not know that S. was already married.

Wild v. *Harris* (1849) 7 C.B. 999 and *Millward* v. *Littlewood* (1850) 5 Exch. 775 applied.

(3) That the claim was not barred by the Limitation Act, 1939, because the relevant breach of warranty took place when S. died, and the claim for breach of promise to marry did not accrue until 1950. Further, the action was based upon fraud within section 26 (*b*) of the Act of 1939.

Beaman v. *A. R. T. S. Ld.* [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465 applied.

(4) That the damages should be assessed having regard to what the plaintiff would have been entitled to receive as a widow on intestacy.

APPEAL from Pilcher J.

In 1937 the plaintiff, then Mrs. Moseley, a widow, met Percy John Shaw, farmer, and later in that year he proposed marriage to her, having described himself to her as a widower. She accepted him and on December 10, 1938, they went through a form of marriage at the Cannock registry office.

For 14 years Percy Shaw and the plaintiff lived as husband and wife at Cannock, during which time the plaintiff advanced to Shaw in varying sums about £250 to buy stock, to assist him in acquiring land, and to pay for agricultural machinery. All those advances were money which she had saved before the marriage.

On February 11, 1952, Percy Shaw died intestate. At the funeral the plaintiff was treated as the widow by the deceased's son, Wilfrid Shaw, and shortly after she began to deal with the estate, believing that she was the widow. The estate was then worth about £1,500 and had been built up with the assistance of the plaintiff. The plaintiff asked Wilfrid Shaw whether he would act with her as joint administrator, and he agreed subject to certain conditions. On March 10, 1952, the plaintiff received a letter from the solicitors acting for Wilfrid Shaw asking for a copy of the will of the deceased, if any will had been left. Then for the first time the question was raised whether the plaintiff was in fact the widow. On April 15, 1952, the solicitors for Wilfrid Shaw wrote to the plaintiff: "In view of the matters "raised . . . you will no doubt delay distribution of any assets "which may be in your hands until the question has been cleared "up. We have written to our client, asking him to bring in his "mother's death certificate and, if possible, her marriage certificate, and we will pass these on to you when they are to hand."

Soon afterwards, the death certificate of Mrs. Cecilia Shaw was produced by one of the daughters of Percy Shaw, a Mrs. Gibson, the second defendant. This certificate showed that the first Mrs. Shaw died on July 5, 1950, and that the information as to her death was given to the registrar by R. Gibson, son-in-law, of 21, Upper Kent Street, Leicester. Cecilia Shaw was described in the certificate as the widow of Percy John Shaw. There was no evidence when Shaw parted from his wife. His daughter, who became Mrs. Gibson, lived with her mother in Leicester; and the son, Wilfrid, the first defendant, lived not far from his father.

Wilfrid Shaw and Mrs. Gibson took out letters of administration to the estate of their father and brought an action in the county court claiming damages in respect of clothing formerly belonging to their father, which the plaintiff had given away, believing that she was his widow. That action was dismissed with costs.

The plaintiff then brought an action against the administrators claiming damages for breach by the deceased of promise to marry, and alleging in substance that when he made a promise of marriage he impliedly warranted that he was in a position to marry her. The defendants by their defence admitted that Percy Shaw was already married when he proposed to marry the plaintiff and that he never did in fact marry her, but they said that she knew that he was married and, further, that there was no breach of promise and that the plaintiff had not suffered damage. Finally, they alleged that the claim was not brought until more than six years had elapsed since the cause of action arose, and that it was, accordingly, barred by section 2 of the Limitation Act, 1939.[1] The plaintiff by her reply alleged fraud.

At the trial no evidence was called on the part of the defendants, and the plaintiff was able to give very little information as to the deceased Mrs. Shaw. There was no evidence when she and Percy John Shaw separated, or when they had last seen each other; nor could it be shown whether Shaw knew that she was still alive when he proposed to remarry, or that he was told when she eventually died. The plaintiff said that Shaw had told her that he was a widower and that his first wife "was buried in "the Potteries." Pilcher J. gave judgment for the defendants, holding that the alleged promise was unenforceable, being contrary to public policy since at the time of the promise Shaw had a wife living.

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[1] Limitation Act, 1939, s. 2: "(1) The following actions shall not "be brought after the expiration of "six years from the date on which "the cause of action accrued, that is "to say: (*a*) actions founded on "simple contract or on tort."
S. 26: "Where . . . (*a*) the action "is based upon the fraud of the "defendant . . . or of any person "through whom he claims . . . or "(*b*) the right of action is concealed "by the fraud of any such person ". . . the period of limitation shall "not begin to run until the plaintiff "has discovered the fraud . . . or "could with reasonable diligence have "discovered it."

The plaintiff appealed.

W. A. Allardice for the plaintiff. The claim for damages for breach of promise of marriage survives against the estate of Percy John Shaw by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1.[2] It is not barred on grounds of public policy, for, although the court would lean against enforcing a promise at the suit of a party to an illegality (see *Pearce* v. *Brooks* [3]), public policy can have no application if the plaintiff did not know of the illegality. The plaintiff here did not know until after Shaw had died that he had been legally married to Cecilia Shaw at the time when he had purported to marry her.

[DENNING L.J. In *Fender* v. *St. John-Mildmay* [4] it was said that the law would not enforce the promise.]

In *Fender* v. *St. John-Mildmay* [4] the promisee knew at the time when the promise was made that the legal wife was alive. Public policy comes in to bar a promise by a married man because of the tendency to immorality and because a man might be incited to murder his wife in order to marry the woman he had promised to marry. It is the promise which is contrary to public policy, not the enforcement of it. [Reference was made to *Modestou* v. *Yiannopoulos*.[5]] In no case has it ever been said that public policy is involved if the promisee is innocent of the illegality; if the defence of public policy had been relevant in this type of case it would presumably have been raised in *Wild* v. *Harris* [6] and *Millward* v. *Littlewood*.[7] The textbooks draw a clear distinction between the position where the promisee is a party to the illegality and cases where the promisee is unaware that the promisor is not in a position to marry: Cheshire on Contracts, 3rd ed., p. 291, and Chitty on Contracts, 20th ed., pp. 475–6. The comments on *Wild* v. *Harris*[8] and *Millward* v. *Littlewood*[9] in *Wilson* v. *Carnley*[10] are obiter; the authority of those cases is not impeached. The same principle is stated and applied in the United States of America: see *Cover* v. *Davenport*,[11] *Kelly* v. *Riley*[12] and *Paddock* v. *Robinson*.[13]

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[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1: "(1) Subject "to the provisions of this section, on "the death of any person after the "commencement of this Act all causes "of action subsisting against or "vested in him shall survive against, ". . . his estate. (2) Where a cause "of action survives as aforesaid for "the benefit of the estate of a "deceased person, the damages re- "coverable for the benefit of the estate "of that person:— . . . (*b*) in the "case of a breach of promise to marry "shall be limited to such damage, if "any, to the estate of that person as "flows from the breach of promise to "marry."

[3] (1866) L.R. 1 Exch. 213.

[4] [1938] A.C. 1; 53 T.L.R. 885; [1937] 3 All E.R. 402.

[5] The Times, March 31, 1954.

[6] (1849) 7 C.B. 999.

[7] (1850) 5 Exch. 775.

The position might be different if it could be shown that Shaw was also unaware that his legal wife was alive at the material date, but there is no clear evidence as to this. His statements that she was dead and was buried in the Potteries were, at best, recklessly indifferent, and if he did not know what had become of his wife he ought to have made reasonable inquiries before going through a ceremony of marriage with the plaintiff. Nor is there any clear evidence as to the state of knowledge of the son, Wilfrid Shaw; but it is, perhaps, significant that when the question arose he was able to find out speedily that his mother had been alive at the material date and to produce her death certificate.

The promise given by Shaw was a promise to marry the plaintiff within a reasonable time; that time did not arrive until he was in a position to marry. It could, however, have been fulfilled when Cecilia Shaw died in 1950. The breach, therefore, did not occur until then, and it is not barred by the Limitation Act, 1939. Alternatively, Shaw was in breach of an implied warranty that he was in a position to marry the plaintiff. That was a continuing warranty and time did not begin to run against the plaintiff until Shaw died.

In the present case the plaintiff is entitled by way of damages to what she would have received if she had been, as she thought she was, Shaw's widow. The fact that she had been maintained by Shaw during their joint married life is irrelevant. She helped him to build up the farm, and he was much more successful after the marriage than before. That success was to some extent attributable to her efforts.

R. E. Chapman for the administrators of Percy John Shaw. Wilfrid Shaw was not called to give evidence because what he could say would not have been admissible evidence as to the state of his father's knowledge. There is no significance in the speedy

[8] 7 C.B. 999.

[9] 5 Exch. 775.

[10] [1908] 1 K.B. 729; 24 T.L.R. 277.

[11] (1870) 2 Am.Rep. (Tennessee) 706.

[12] (1871) 8 Am.Rep. (Massachusetts) 336.

[13] (1871) 14 Am.Rep. (Illinois) 112.

discovery of his mother's death certificate. It was discovered at Somerset House, after he had consented to act as joint administrator with the plaintiff, in the course of the ordinary inquiries as administrator.

This was a contract entered into under a mistake of fact on both sides. The alleged warranty was innocently misrepresented by Shaw, for there is no evidence that he was aware that his legal wife was alive at the material time, and the court will not assume that fraud was committed in the absence of such evidence. In the cases cited the promisor was, on the evidence, acting fraudulently and with knowledge of the impediment to marriage.

The claim is statute-barred because the promise was one to marry on a fixed future date. The breach of that promise occurred when the promisor was unable to marry on that date. The warranty also must have been in relation to the actual contract; Shaw promised and warranted that he was free to marry on that date. The cause of action arose then. Pilcher J. did not find fraud, and therefore section 26 (*b*) of the Limitation Act, 1939, does not apply.

Damages are limited to those matters which may be said to have been in the contemplation of the parties at the time when the contract was entered into. The cause of action was the breach of the promise to marry, and, even if the plaintiff's claim is admitted, only special damages due to the breach would, by virtue of section 1 (2) (*b*) of the Act of 1934, be admissible: see *Riley* v. *Brown.*[14]

[DENNING L.J. There is a clear distinction between this case and one where no "marriage" has taken place. In the latter only special damages can be obtained, but here there is a continuing warranty that the promisor was free to marry throughout the period of the "marriage." Section 1 (2) (*b*) is dealing with the position where the promisee dies and her executors are claiming damages. In such a case the damages are restricted to the damage to her estate.]

[SINGLETON L.J. There is nothing to say that if the promisor dies the damage claimed by the living promisee is limited to special damages.]

W. A. Allardice in reply. If it be shown that the breach occurred in 1938, then it is submitted that there was concealed fraud and the claim is preserved by section 26 (*b*) of the Limitation Act, 1939. That was mentioned in *Beaman* v. *A. R. T. S. Ld.*[15]

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[14] (1929) 45 T.L.R. 613.

[15] [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465.

"Fraud," in section 26 (*b*), is used in a broad sense and will include the results of unthinking or reckless conduct.

[DENNING L.J. It is not necessary to prove that there was moral turpitude; it is sufficient for the plaintiff to show that the essential knowledge was kept from her.]

SINGLETON L.J. stated the facts and continued: The main argument of Mr. Allardice, on behalf of the plaintiff, is that the judge was wrong in deciding that she could have no right of action on the ground that the enforcement of the contract to marry would be against public policy.

In *Fender* v. *St. John-Mildmay*,[1] it was decided that: "A "promise made by one spouse, after a decree nisi for the dis-"solution of the marriage has been pronounced, to marry a third "person after the decree has been made absolute is not void "as being against public policy, and an action for damages for "breach of the promise is maintainable by the third person." Several of the speeches in the House of Lords in that case deal with the question of public policy. Lord Wright said[2]: "I "must first attempt to explain what I think to be the modern "law in regard to the duty of the court concerning rules based "on public policy. It is important to realize what is meant by "public policy in this connexion. In one sense every rule of "law, either common law or equity, which has been laid down "by the courts, in that course of judicial legislation which has "evolved the law of this country, has been based on considera-"tions of public interest or policy. In that sense Sir George "Jessel M.R. referred to the paramount public policy that people "should fulfil their contracts. But public policy in the narrower "sense means that there are considerations of public interest "which require the courts to depart from their primary function "of enforcing contracts, and exceptionally to refuse to enforce "them. Public policy in this sense is disabling. It is important "to determine first of all on what principles a judge should "exercise this peculiar and exceptional jurisdiction when a "question of public policy is raised. What is, I think, now clear "is that public policy is not a branch of law to be extended, as "Lord Blanesburgh, then Younger L.J., said in *In re Wallace*.[3] "To the same effect Lord Halsbury in *Janson* v. *Driefontein*

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[1] [1938] A.C. 1; 53 T.L.R. 885; [1937] 3 All E.R. 402.

[2] [1938] A.C. 1, 38.

[3] [1920] 2 Ch. 274, 303; 36 T.L.R. 481.

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" *Consolidated Mines* said[4]: 'I deny that any court can invent "'a new head of public policy.'" Lord Wright also said[5]: " The law will not enforce an immoral promise, such as a promise " between a man and a woman to live together without being " married or to pay a sum of money or to give some other con- " sideration in return for immoral association. But nothing of the " sort was suggested in this case. On the contrary, the promise, " if carried out, would have regularized an immoral association."

The second passage bears on what may be regarded as the alternative submission by the plaintiff. The plaintiff's case is that Shaw's promise to marry her involved a warranty that he was in a position so to do; as he did not do so, she claims that she is entitled to damages. Alternatively, Mr. Allardice submitted that when Cecilia Shaw died in 1950 Shaw then could have married the plaintiff, and have regularized what might be spoken of as an immoral association. She believed until April, 1952, some two months after Shaw died, that she was legitimately married to him.

The authorities which have been cited to the court show a great difference between the case in which there is an effort to enforce a marriage when both parties know that the promisor is not able to go through a lawful form of marriage and a case in which that fact is known only to one of them.

That is made clear by *Wild* v. *Harris*[6] and *Millward* v. *Littlewood.*[7] The headnote of the latter reads: " A declaration " alleged, that, in consideration that the plaintiff, at the defen- " dant's request, promised to marry him, he promised the " plaintiff to marry her. Averments: that the plaintiff hath " continued and still is unmarried, and, until the discovery of " the defendant's marriage, was ready and willing to marry him; " that, after the defendant's promise, the plaintiff discovered " that the defendant, at the time of his promise, was, and still " is, married, and that the plaintiff had not, at the time of the " defendant's promise, any notice of the defendant's then " marriage." It was held, " on motion in arrest of judgment " that the declaration was good; and that the plaintiff's remaining " unmarried was a sufficient consideration to support the defen- " dant's promise." The verdict of the jury in favour of the plaintiff with £200 damages stood.

In that case it was submitted by counsel on behalf of the defendant[8]: ". . . the case of *Wild* v. *Harris*[9] cannot be "supported. A contract of this kind is contra bonos mores, "and against public policy. The language of Lord Mansfield, in "*Holman* v. *Johnson*[10] with reference to immoral and illegal "contracts, applies here. Besides, at the time of the promise, "the defendant could not perform it, and, therefore, the promise "is void."

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[4] [1902] A.C. 484, 491; 18 T.L.R. 796.

[5] [1938] A.C. 1, 42.

[6] (1849) 7 C.B. 999.

[7] (1850) 5 Exch. 775.

Pollock C.B. in the first judgment, said[11]: "There ought to "be no rule. The case of *Wild* v. *Harris*[12] does not in substance "differ from this. Therefore, as there is the judgment of a court "of co-ordinate jurisdiction upon the express point, I feel myself "bound by it, and must leave the parties to question that decision "in a Court of Error. I own, however, that I am disposed to "differ from the authorities which have been referred to. I "think it is inconsistent with that affection which ought to subsist "between married persons, that a man should, while his wife is "alive, promise to marry another woman after his wife's death. "Nothing but the judgment of the highest tribunal will compel "me to think, that, by the law of the land, such a promise is "good."

Alderson B. said[13]: "It is unnecessary to decide whether a "promise by a man to marry a woman after his wife's death is "good, because here it is found as a fact that the plaintiff had "no knowledge that the defendant was married. In my opinion "the difficulty arises in respect of the promise alleged being a "promise to marry within an indefinite time. What was decided "by the recent case in the Court of Common Pleas, I think, was "rightly decided."

Parke B. said[14]: "I entirely concur in what was said by the "Court of Common Pleas in *Wild* v. *Harris*.[15] The promise by "the defendant to marry the plaintiff implies, on his part, that "he is then capable of marrying, and he has broken that promise "at the time of making it. The consideration to support the "promise is, that the plaintiff, at the request of the defendant, "engaged to marry him within a reasonable time, and therefore "she remained unmarried; and that is a sufficient consideration "to bind the defendant." If Parke B. had thought that there was anything in the point raised that the contract was against public policy he would have said so.

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[8] 5 Exch. 775, 776.

[9] 7 C.B. 999.

[10] (1775) 1 Cowp. 341, 343.

[11] 5 Exch. 775, 777.

[12] 7 C.B. 999.

[13] 5 Exch. 775, 777.

[14] Ibid. 778.

[15] 7 C.B. 999.

Counsel for the defendants told us that he did not raise the question of public policy. It appeared from the authorities cited by counsel for the plaintiff that such a question might be raised, and Pilcher J. gave judgment upon it. The two authorities which I have just mentioned, *Wild* v. *Harris*[15] and *Millward* v. *Littlewood*,[16] show that neither the Court of the Exchequer in 1850 nor the Court of Common Pleas in 1849 thought it necessary for the court to raise any such question in a case in which the plaintiff did not know that the defendant was married, and did not know that his promise might be contrary to public policy. I believe that to be right. I do not consider that it is the duty of the court to make such a point on the facts of this case. If ever there was a case in which the plaintiff ought to be entitled to succeed, it is the present case, for Shaw persuaded her to marry him, pretended that he was a widower when he was not, and having gone through a form of marriage with her, acquired all her savings from her for use in his affairs, and he did not, in fact, marry her. If he knew that his wife died in 1950 he might then have married the plaintiff. No evidence was given on behalf of the defendants, and I do not know the circumstances in which Shaw had parted from his wife, nor whether he heard of her or from her, or whether he knew when she died. It was his duty to make inquiries before he went through a form of marriage with the plaintiff, and if he did know that his wife was alive after that time, and that she died in 1950, he ought to have gone through a form of marriage then, even if it might have led to inquiry with a possible risk of a prosecution for bigamy. If he had married the plaintiff after his wife's death, when he died she would have been his widow, and she would have had the rights of a widow on his intestacy. She thought that she was his widow, and she walked with his son at the funeral. Thereafter the son and the daughter, the defendants, denied that the plaintiff was the widow, stating that their mother was alive at the time when the plaintiff went through the ceremony of marriage, and that the plaintiff had no right to anything, and that everything passed to the defendants and their brothers and sisters.

Mr. Chapman, on behalf of the defendants, raises two questions. One is that the cause of action accrued in 1938, that the Limitation Act, 1939, runs from that time, and, consequently, an action cannot be brought after six years have elapsed since 1938. There are several answers to that submission. First, there was a continuing warranty running with the promise to marry, a promise which Shaw never fulfilled. That warranty was the basis of the relationship, as the plaintiff said in her evidence. She would not have gone through a form of marriage with Shaw unless she had thought that he was a widower; she would not have lived with him as his wife, nor would she have given him her savings. He promised to marry her when he was not in a position so to do; he broke his warranty; and it follows from that, as I think, that the damage which she sustained did not arise, or accrue, until after Shaw's death. When his death occurred his son and his daughter raised the question, and it was found that she had none of the rights of a wife, and it was then that the damage accrued. Secondly, section 26 (*b*) of the Limitation Act, 1939, covers this point. There was here something in the nature of a concealed fraud, and the case is well within that which was said by the Court of Appeal in *Beaman* v. *A. R. T. S. Ld.*[17]

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[15] 7 C.B. 999.

[16] 5 Exch. 775.

Mr. Chapman also raises the question that even if there should be a right of action, it can only be in respect of the special damage alleged and proved, and he cited in support of that proposition the judgment of Roche J. in *Riley* v. *Brown.*[18] I do not think that that judgment helps in the present case, for it seems to me that the Law Reform (Miscellaneous Provisions) Act, 1934, has altered the position by the words in section 1 (1): "Subject to "the provisions of this section, on the death of any person after "the commencement of this Act all causes of action subsisting "against or vested in him shall survive against, or, as the case "may be, for the benefit of, his estate. . . ." There was, on the death of Shaw, a cause of action subsisting against him, and that cause of action survives against his estate. Mr. Chapman referred the court to subsection (2) (*b*) of that section, which, to my mind, does not touch the position which arises. I do not think that that submission is of help to the defendants.

In my view the plaintiff is entitled to damages for breach of promise. The advances which she made to Percy Shaw, believing that she was married to him, were claimed as special damages, but in my opinion the right way to assess the damages to which she is entitled is to consider that if Shaw had fulfilled his promise, as he might have done, the plaintiff would have been his widow. If she had been, she would have had the rights of a widow.

Pilcher J. was asked at the end of the hearing to make a provisional assessment of the damages. He had said: "I should

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[17] [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465.

[18] (1929) 45 T.L.R. 613.

"have liked, if I had felt that I was entitled to do so consistently "with my duty, to have determined this case in her favour, but "for the reasons which I have given, and which I do not propose "to elaborate further, I have come to the conclusion that this "action must fail and there must be judgment for the defen- "dants." He added that he did not think that it was a case in which the damages should be large, and he said: "I think the "woman appears to have had a happy life, believing herself to be "married for 14 years, and in her maturer years she now "finds that in point of fact she is once again, and always has "been, a widow. In the circumstances I think that having been "maintained by the deceased man throughout those 14 years, if "she gets back £250 that would be all to which she is entitled."

That provisional assessment of the damages was made without hearing argument upon the matter, and I do not think that sufficient attention was paid to all the circumstances. Pilcher J. said that the plaintiff had been maintained by Shaw for all those years. During those years she was working on the farm and keeping the house, and helping him; as the judge said, Shaw was more prosperous at the end of his life than he was at the time when he went through the form of marriage with the plaintiff. She had helped him; she had let him have her money; she might have got something more than £1,000 if she had been his widow, and, for my part, I think that a fair assessment of the damages to which the plaintiff is entitled is the sum of £1,000. I would allow the appeal accordingly and direct that judgment be entered for the plaintiff for the sum of £1,000 damages.

DENNING L.J. Every man who proposes marriage to a woman impliedly warrants that he is in a position to marry her, and that he is not himself a married man; and he reaffirms that warranty when he afterwards goes through a form of marriage with her—whether in church or in a registry office. To take the familiar words of the banns of marriage, he warrants that there is no "cause or just impediment" why he should not marry her. Every day of their married life he continues the warranty; he warrants that their marriage was valid and that there was no impediment to it.

In the present case the law imports that Percy Shaw gave such a warranty to the plaintiff. On the faith of it, she went through a form of marriage with him, she lived with him as his wife for 14 years, she put her money into the farm and did all the work of a farmer's wife, and when he died she followed his coffin to the grave as his widow. His estate was worth £1,500 or more, which she had helped to make; and yet the administrators now turn round and say that she was never his wife because he was already married, and that his real wife did not die until 1950. In my judgment Shaw broke his warranty at every point. He broke it when he proposed marriage; he broke it when he married the plaintiff; and he broke it throughout their married life. The breach continued all the time. The most important breach of all was at the moment of his death, because when he died she was not his widow, as she thought she was. She was in law a stranger. That is the breach for which, in my judgment, damages can be recovered.

But what is the proper measure of damages? If she had been his widow when he died intestate, as she thought she was, she would have received the widow's £1,000 and life interest in half of the remainder of the estate. Those are the direct damages which she has suffered by this breach of warranty, and which, in my judgment, she is entitled to recover. It is said that an implied warranty is not alleged in the pleadings, but all the material facts are alleged, and in these days, so long as those facts are alleged, that is sufficient for the court to proceed to judgment without putting any particular legal label upon the cause of action.

The same result can be reached, however, by considering this as being a claim for breach of promise of marriage. Clearly Shaw did promise to marry the plaintiff, and after his own wife had died in 1950, he was in a position to marry her and could have implemented his promise, but he did not do so. It would not lie in his mouth to say that a reasonable time had expired, because it was all due to him that the marriage had not taken place before. He ought to have married her in 1950 when he was free to do so, and there was a breach of the promise at that time for which like damages could be recovered. Although it is true that damages in an action for breach of promise, after the death of the man, are limited to special damages, I regard the damages which I have mentioned as being special damages within that rule.

The Limitation Act, 1939, is, in my judgment, no answer to the breach of warranty, because the breach took place on his death in 1952. It is also no answer to the breach of promise to marry, because that breach took place in 1950. In any case, as my Lord has said, the plaintiff can rely on section 26 (b) and the decision of this court in *Beaman* v. *A. R. T. S. Ld.*[19] That case shows that the word "fraud" in the statute is not used in the sense of moral turpitude, and that section 26 (*b*) avails a plaintiff in circumstances such as have arisen here when knowledge has been kept from her by the conduct of the deceased man.

If the plaintiff had known that Shaw was a married man the case would be altogether different. Then, of course, no court would allow such a contract to be enforced, but as she was quite unaware of the position the case falls within *Wild* v. *Harris*[20] and *Millward* v. *Littlewood*,[21] and it is interesting to notice that there are cases in the United States on exactly the same lines. [See the cases cited in argument.] I agree with my Lord that the appeal should be allowed, and that damages of £1,000 should be awarded.

Morris L.J. I also agree. Until Percy John Shaw died the events in the joint lives of Percy John Shaw and the plaintiff were the same as they would have been if the marriage ceremony which took place had been valid. If the ceremony had been a valid marriage, on the death of Percy John Shaw, in the events which have happened, the plaintiff would have been entitled to at least £1,000 out of his estate. Pilcher J. did not have full evidence before him, but he said that, for all he knew, Shaw and his lawful wife might have been parted for 10 or 15 years, and he said that Shaw might have had grounds for supposing that his wife was dead when he represented himself to the plaintiff as being a widower. He said that that matter remained unascertainable, and added that it was possible that Shaw had honestly believed that he was a widower, though, of course, on insufficient grounds. Even approaching the case on that footing, I agree that the plaintiff is entitled to succeed. It seems to me that, in conformity with what was said by Parke B. in *Millward* v. *Littlewood*,[21] to which reference has been made, the promise which was entered into by Shaw carried with it a promise and an implication that he was capable of marrying. That promise, the warranty that he so entered into, was broken.

The substantial damages arising out of the breach of that promise on his part arose in reality after his death, but throughout the intervening period between the ceremony and that date the plaintiff continued her life in the constant belief that she was lawfully married, and lived in the belief that she was the legal wife of Percy John Shaw. She was confident in that belief, which was a belief wholly induced by him. The very least that can be said against him is that he omitted to make inquiries or to get verification; he allowed her to go on in the confident belief, and it was his reckless assurance on so important a matter that caused her to be in complete ignorance of the true position.

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[19] [1949] 1 K.B. 550.

[20] 7 C.B. 999.

[21] 5 Exch. 775.

Having regard to those circumstances, and in view of the principles which were laid down by the Court of Appeal in *Beaman* v. *A. R. T. S. Ld.*,[22] I think the result follows that under section 26 of the Limitation Act, 1939, the period of limitation did not in the present case begin to run until the plaintiff had discovered the falsity of the belief which was induced in her by the late Percy John Shaw. I consider, therefore, that the plaintiff was entitled to succeed, and to succeed for the amount which Singleton L.J. has mentioned.

Appeal allowed with costs. Judgment for the plaintiff for £1,000.

Solicitors: *Sharpe, Pritchard & Co. for Dallow & Dallow, Wolverhampton; Peacock & Goddard for J. C. H. Bowdler & Sons, Shrewsbury.*

E. D.

[22] [1949] 1 K.B. 550.

BROWN *v.* ALLWEATHER MECHANICAL GROUTING CO. LD.

1953
Feb. 5.

Lord Goddard C.J., Lynskey and Pearson JJ.

Road Traffic—Licence—Motor-vehicle—Licence for use for particular purpose—Use for purpose requiring higher duty—Penalty—Use not a criminal offence—Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *s.* 13 (2).

Section 13 (2) of the Vehicles (Excise) Act, 1949, which imposes a penalty for the use of a mechanically propelled vehicle for a purpose which would bring the vehicle into a class or description of vehicle to which a higher rate of duty than that charged would be applicable, does not create an offence punishable on summary conviction within the meaning of section 5 of the Summary Jurisdiction Act, 1848, and the owner of a vehicle used in contravention of the provisions of the Act of 1949 cannot, therefore, be proceeded against for aiding and abetting the unauthorized use of the vehicle by the driver thereof.

Attorney-General v. *Bradlaugh* (1885) 14 Q.B.D. 667 considered.

CASE STATED by Oxfordshire justices.

An information was preferred by the appellant, a police inspector, against the respondents charging that on June 18, 1952, they unlawfully aided, abetted and procured one Joseph Cassidy, a driver in their employment, in the commission of a summary offence in contravention of section 13 (2) of the Vehicles (Excise) Act, 1949,[1] in that, while there was then in force a certain licence taken out for a mechanically propelled vehicle, namely, a goods vehicle, at a certain rate, he had unlawfully used such vehicle on a public road for a purpose which brought it within a class or description of vehicle on which a higher rate of duty was chargeable, such higher rate not having been paid before the vehicle was used, contrary to section 5 of the Summary Jurisdiction Act, 1848.

At the hearing before the justices the preliminary objection was taken on behalf of the respondents that section 13 (2) of the Vehicles (Excise) Act did not create an offence punishable on summary conviction within the meaning of section 5 of the Summary Jurisdiction Act, 1848, and that, therefore, the respondents could not be convicted of aiding and abetting the offence. It was also submitted that if there had been a breach of the regulation whereby a local licensing authority had been deprived of a certain amount of revenue, such authority had its remedy against the person liable to excise penalties under the Vehicles (Excise) Act, 1949.

The justices accepted the submission for the respondents and dismissed the information. The prosecutor appealed.

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[1] Vehicles (Excise) Act, 1949, s. 13: "(1) Subject to the provisions of this "section, where a licence has been "taken out in respect of a mechani-"cally propelled vehicle at any rate "under this Act and the vehicle is at "any time while the licence is in "force used in an altered condition or "in a manner or for a purpose which "brings it within, or which if it was "used solely in that condition or in "that manner or for that purpose "would bring it within, a class or "description of vehicle to which a "higher rate of duty is applicable "under this Act, duty at that higher "rate shall become chargeable in "respect of the licence for the "vehicle. . . ."

"(2) Where a licence has been "taken out in respect of a mechani-"cally propelled vehicle, and by virtue "of such user as aforesaid a higher "rate of duty becomes chargeable "and duty at the higher rate was not "paid before the vehicle was so used, "the person so using the vehicle shall "be liable to whichever is the greater "of the following penalties, namely— "(*a*) an excise penalty of twenty "pounds; or (*b*) an excise penalty of "an amount equal to three times the "difference between the duty actually "paid on the licence and the amount "of duty at that higher rate."

J. P. Ashworth for the appellant. The justices were wrong in dismissing the information against the respondents. What their servant did constituted a criminal offence punishable on summary conviction within the meaning of section 5 of the Summary Jurisdiction Act, 1848, and they were rightly charged with aiding and abetting. It is true that the word "offence" is not used in section 13 (2) of the Vehicles (Excise) Act, 1949, which imposes the penalty, but it is used in section 15 (2), which is concerned with using a vehicle without a licence at all, and which imposes a penalty similar to that imposed by section 13 (2), and it also appears in subsections (3) and (4) of section 15. It is submitted that "offence" in section 15 means a criminal offence, and that the act charged in the present case was also an offence in the same sense. As the respondents acted as aiders and abettors in the commission of that offence they were properly charged under the Act of 1848.

Roland Brown for the respondents. The information against the respondents was properly dismissed by the justices for two reasons: (1) proceedings for the recovery of an excise penalty are not criminal proceedings and, consequently, section 13 (2) of the Vehicles (Excise) Act, 1949, creates no criminal offence; and (2) section 5 of the Summary Jurisdiction Act, 1848, is concerned only with the punishment of those who aid and abet criminal offences. It is well settled that there is a distinction between a statute which provides for the payment of penalties recoverable either at the suit of the Crown or of a private individual in proceedings which are in the nature of civil proceedings, and one which provides for the punishment of a crime: see *Attorney-General* v. *Bradlaugh* [2]; *Rex* v. *Hausmann.*[3] Before the passing of the Crown Proceedings Act an excise penalty could be recovered by the Crown by way of a Latin information, which was a civil proceeding, and down to the time of the Judicature Act such proceedings were brought in the Court of Exchequer, a court which had no criminal jurisdiction: see *per* Brett M.R. in *Attorney-General* v. *Bradlaugh.*[4] It is conceded by the appellant that section 5 of the Summary Jurisdiction Act, 1848, is concerned only with the punishment of persons who are guilty of aiding and abetting the commission of criminal offences, and as no criminal offence was involved in the present instance the justices were right in dismissing the information.[5]

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[2] (1885) 14 Q.B.D. 667.

[3] (1909) 26 T.L.R. 3; 3 Cr.App. R. 3.

[4] 14 Q.B.D. 667.

LORD GODDARD C.J. stated the charge against the respondents and continued: At the hearing before the justices, Mr. Brown, for the respondents, took a very interesting point, and one of great importance, and the court is indebted to him for bringing out this point which had not occurred to anybody before, although there have been a number of proceedings under the section in question. His point was that section 13 (2) of the Vehicles (Excise) Act, 1949, did not create an offence punishable on summary conviction and, if that is so, it follows that section 5 of the Summary Jurisdiction Act, 1848, which deals with the prosecution of aiders and abettors of summary offences, has no application.

Concisely stated, Mr. Brown's point is that the sanction provided by the Act of 1949 for using a vehicle which has one class of licence attached to it for a purpose which requires a different class of licence, is a monetary penalty which can be recovered in various forms of proceedings, but is not an offence in the sense that it is punishable as a criminal offence, although a penalty may be recovered in what would generally be called penal proceedings. It is true that there is a general rule that if the word "penalty" is used in a section as distinct from the word "fine," the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court, and always goes to the Crown.

In this case the alleged offence was one against section 13 of the Vehicles (Excise) Act, 1949, and it is to be observed that it is an excise Act, and that therefore the Excise Management Act, 1827, applies to proceedings under it. Under the Act of 1949 a person using a vehicle for a purpose for which it is not licensed and which would attract a higher rate of licence, is made liable to an excise penalty of £20 or an excise penalty of an amount equal to three times the difference between the duty actually paid on the licence and the amount of the duty at the higher rate, and there are no words in the section which in any way refer to summary conviction or a summary trial or to fines or to anything which indicates that a criminal offence is created. It is observable that in section 15, which applies to using vehicles without a licence at all, the same penalty is imposed, that is, an excise penalty of £20 or an excise penalty "equal to three times "the amount of the duty chargeable." Then subsection (2) provides: "Proceedings for a penalty under the last foregoing "subsection may be brought at any time within a period of 12 "months from the date on which the offence was committed." There, the word "offence" is used. Then there is a further provision in subsection (3) which obliges the owner of the vehicle to give such information as he may be required to do "by or "on behalf of a chief officer of police or a county council . . . "as to the identity of the driver and of any person using "the vehicle and, if he fails to do so, shall be guilty of an "offence under this subsection, unless he shows to the satisfac-"tion of the court that he did not know and could not with "reasonable diligence have ascertained who was driving or using "the vehicle; and (*b*) any other person shall, if required as "aforesaid, give any information which it is in his power to "give." Then in subsection (4) it is provided: "A person "guilty of an offence under the last foregoing subsection shall "be liable on a summary conviction to a fine not exceeding "twenty pounds." Therefore, if someone fails to give information when they are asked for it, that is made an offence by the statute and the word "fine" is used and not "penalty."

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[5] *Rex* v. *Justices of the Appeals Committee of London Quarter Sessions* [1946] K.B. 176; 69 T.L.R. 134; [1946] 1 All E.R. 129, which may have some bearing on the question raised, was not cited by either counsel in argument.

We are not considering section 15, but Mr. Ashworth, quite rightly, drew our attention to subsection (2) of that section because the subject-matter is very much the same as that of section 13 (2). The penalty is exactly the same, and subsection (2) of section 15 indeed says that "proceedings . . . may be brought at "any time within a period of 12 months from the date on which "the offence was committed." In other words, it is imposing an express term of limitation, in this case, of 12 months. I do not think that the mere fact that the word "offence" is used in subsection (2) shows that it is to be regarded as a criminal offence. A failure to do something prescribed by a statute may be described as an offence although Parliament does not impose a criminal sanction upon it, but a mere pecuniary sanction which is to be recovered as a civil debt. Justices, as is well known, have in very many cases power to order the recovery of sums of money. In section 65 of the Excise Management Act, 1827, one finds that excise penalties may always be recovered before justices of the peace, but there is no indication in the section that justices are empowered to imprison or to impose a fine. It simply gives them power to impose penalties. Of course, once penalties have been imposed, if they are not paid there may be proceedings under the Debtors Act and many other Acts, and possibly under the Summary Jurisdiction Acts, and a committal to prison may be made, but that is because the penalty has not been paid. It is not a punishment for the offence itself. It is a punishment for not paying, or a means of endeavouring to compel a defendant to pay a penalty, which is a different matter.

Passages in the judgment of the Master of the Rolls in *Attorney-General* v. *Bradlaugh*,[1] to which Mr. Brown directed our attention, fully support his argument. The Master of the Rolls points out in that case that where a penalty is imposed for doing a particular act, the penalty is the only sanction, and the recovery of the penalty, if that is the only consequence, does not make the prohibited act a crime. It was far more common in those days than it is nowadays to prohibit certain acts and to impose, as the sanction, the recovery of the penalty, which the Acts very often provided could be recovered by a common informer. There were many Acts of that kind on the statute book till last year, when the Common Informers Act was passed, which abolished that particular form of public nuisance. A well-known example of the type of Act to which I have referred was the Sunday Observance Act, under which, if a person gave a theatrical performance or certain other entertainments on Sunday he was liable to a penalty which could be sued for, and used to be sued for in recent times, by a common informer, but no one ever suggested that a criminal act had been committed.

Whether or not it would be desirable to make the subject-matter of these penalties criminal acts I do not know, nor need I discuss the question, but in my opinion an excise penalty is something quite different from a fine. It is recoverable before justices and it ought to be recovered by way of complaint. I only say that for this reason: many people who see this case may think that they have been wrongly ordered to pay, but this court will not encourage anybody to apply for a free pardon on the ground that he was convicted of an offence of which he was not guilty, because he has been ordered to pay in a proceeding begun by information when it ought to have been begun by complaint. If such a person has done the prohibited act, he incurred the penalty which has been imposed. On the point raised by this case, in my opinion, the justices came

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[1] (1885) 14 Q.B.D. 667.

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to a perfectly right decision in point of law, and therefore this appeal fails.

LYNSKEY J. I agree.

PEARSON J. I agree.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Cripps, Harries, Hall & Co.*

P. B. D.

ATTRIDGE *v.* LONDON COUNTY COUNCIL.

[1951 A. No. 3097.]

1954
May 10, 11.

Ormerod J.

Housing — Compulsory purchase — Powers on acquisition — Site for development as a housing estate—House already on site suitable as a house for the working classes — Power of local authority to demolish house in order to construct a road—" Houses "—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 72, 73, 79 (4).

Section 73 of the Housing Act, 1936 [prior to amendment by the Housing Act, 1949], gives local authorities power " (*a*) to acquire " any land, including any houses . . . thereon, as a site for the erection of houses for the working classes; (*b*) to acquire any houses " . . . which are, or may be made, suitable as houses for the working " classes . . ." By section 79 (4): " Where a local authority acquire " a house . . . which can be made suitable as a house for the working " classes . . . they shall forthwith proceed to secure the alteration, " enlargement, repair or improvement of the house."

The meaning of the word " houses " in section 73 (*a*) is not restricted to houses other than houses suitable for the accommodation of the working classes, and therefore, although a local authority who acquire under section 73 (*b*) a house which is, or which can be made, suitable for the accommodation of the working classes may well be bound to deal with it in accordance with the provisions of section 79 (4), where such a house is acquired under section 73 (*a*) as part of a site for the purposes of development into a housing estate, its existence on the site does not preclude the local authority from demolishing it in order to carry out their plans for development, and section 79 (4) has no application.

Where, therefore, the plans of a local authority for the development of a site compulsorily acquired under Part V of the Act as a housing estate involved the demolition of a bungalow capable of being used as a house for the working classes, which was already on the site, in order to construct a road giving access to the housing estate, and the occupier of the bungalow alleged that the local authority had no power to demolish it:—

Held, that the bungalow had been acquired under section 73 (*a*) as part of a site for development as a housing estate, and therefore section 79 (4) had no application and the local authority were entitled to demolish the bungalow in order to carry out their plans for development.

Uttoxeter Urban District Council v. *Clarke* [1952] 1 All E.R. 1318; [1952] W.N. 255 followed.

ACTION.

On May 11, 1948, the London County Council made an order under the Housing Act, 1936, and the Acquisition of Land (Authorization Procedure) Act, 1946, for the compulsory purchase of an area of land at Hainault, Essex, for the purposes of the Housing Act, 1936, for development as a housing estate. Among the land comprised in the order was a bungalow and some 16 or 17 acres of land owned and occupied by the plaintiff, Mrs. Attridge. The plaintiff objected to the compulsory purchase order, but on January 7, 1949, after a public inquiry had been held, it was confirmed by the Minister of Health. No appeal having been made by the plaintiff within the period prescribed by the Acquisition of Land (Authorization Procedure) Act, 1946, the order became valid on February 11, 1949.

During 1950 and 1951 the defendants, having served notice of their intention to enter from time to time, entered and fenced off part of the plaintiff's land. In 1951 they served a notice of their intention to enter upon the bungalow and the whole of the land. The plaintiff refused to accept the notice and, in the events which happened, she remained in occupation of the bungalow. The defendants' scheme for the development of the land as a housing estate included the construction of a road running round the estate and giving access to a main road, and in order to construct the road they intended to demolish the plaintiff's bungalow.

The plaintiff alleged that, since her house was suitable as a dwelling-house for the working classes, the defendants' power to purchase her property was subject to the performance by them of their duty under section 79 (4) of the Housing Act, 1936,[1] and that, as their scheme for development did not provide for the performance of that duty, the notices of intention to enter served upon her by the defendants were invalid and of no effect. She claimed an injunction restraining the defendants from trespassing upon her premises or from proceeding with any scheme or plan to pull down or demolish her house. She also claimed a declaration that the defendants were not entitled to proceed with any scheme or plan compulsorily to acquire her premises or with any scheme or plan to pull down or demolish her dwelling-house, or, alternatively, a declaration that the provisions of section 79 (4) of the Housing Act, 1936, applied to her dwelling-house.

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[1] Housing Act, 1936 [before amendment by the Housing Act, 1949], s. 72: "(1) A local authority "may provide housing accommodation "for the working classes—(*a*) by the "erection of houses on any land "acquired or appropriated by them; "(*b*) by the conversion of any build- "ings into houses for the working "classes; (*c*) by acquiring houses "suitable for the purpose; (*d*) by "altering, enlarging, repairing or

The defendants contended that any act that they had done, or which they wished to do, in relation to the plaintiff's property was in accordance with the provisions of the Housing Act, 1936.

H. J. Phillimore Q.C. and *J. R. Samuel-Gibbon* for the plaintiff. It is conceded that the compulsory purchase order cannot now be challenged, but it is submitted that the defendants have no power to take possession of the plaintiff's property in order to demolish the bungalow. The defendants had power to acquire the property under section 73, in Part V of the Act; Part V is headed "Provision of housing accommodation for the working "classes," and section 73 and the other relevant sections must be construed consistently with one another and in accordance with the dominant intention of Part V. Section 72, which is concerned with the provision of houses for the working classes, contains no reference to demolition. Section 73 (*a*) gives a local authority power to acquire land, including any houses or other buildings, as a site for the erection of houses for the working classes, but it is submitted that the Act distinguishes between houses, houses for the working classes, and land, and that the houses which a local authority may acquire under section 73 (*a*) are houses other than houses for the working classes; section 73 (*b*) makes it clear

"improving any houses or buildings "which have . . . been acquired by "the local authority."

S. 73: "A local authority shall "have power under this Part of this "Act—(*a*) to acquire any land, including any houses . . . thereon, as a "site for the erection of houses for "the working classes; (*b*) to acquire "any houses . . . which are, or may "be made, suitable as houses for the "working classes."

S. 79: "(1) Where a local "authority have acquired . . . any "land for the purposes of this Part "of this Act . . . the authority may "(*a*) lay out and construct public "streets or roads and open spaces on "the land, . . . (4) Where a local "authority acquire a house . . . which "can be made suitable as a house for "the working classes . . . they shall "forthwith proceed to secure the "alteration, enlargement, repair or "improvement of the house . . ."

that that distinction was intended, and it is only under (*b*) that a local authority may acquire a house which is suitable, or can be made suitable, for the working classes. "Land" in section 79 (1) does not mean land with a house on it, and that subsection must be read in conjunction with subsection (4) where the words "house for the working classes" are a direct link with section 73 (*b*). It follows that where, as here, land is acquired on which there is already a house suitable for the working classes, the acquisition is under section 73 (*b*), section 79 (4) comes into operation, and the local authority must "forthwith proceed to secure "the alteration, enlargement, repair or improvement of the "house." It would make nonsense of section 79 (4) if a house suitable for the working classes could be treated as a site acquired under section 73 (*a*) and demolished to lay out roads. Section 79 (4) is a mandatory section requiring a local authority to do the opposite of what the defendants propose to do in this case. It would be strange if an Act which is concerned with the provision of working class houses gave power to demolish such a house. The language of an Act, where dispossession of the subject is concerned, should not be strained. *In re Bowman*[2] illustrates the attitude adopted by the courts. [Reference was also made to *Uttoxeter Urban District Council* v. *Clarke*.[3]] The plaintiff's bungalow is a working class dwelling and it is submitted that the defendants are bound to deal with it in accordance with section 79 (4), and that they would be acting ultra vires if they proceeded with their proposed scheme.

Percy Lamb Q.C. and *J. Ramsay Willis* for the defendants. The Act does not draw the distinctions contended for by the plaintiff. "Land" must be construed in the light of the definition in section 3 of the Interpretation Act, 1889, as including houses of any tenure, a definition only slightly different from that in the Housing Act, 1936. If the contention for the plaintiff is right, wherever the words "house" or "houses" occur in the Act they must mean something other than a house which is, or which can be made, suitable for the working classes; that distinction is untenable; see, for example, section 72, which provides that a local authority can provide housing accommodation for the working classes by the erection of "houses" and also by acquiring "houses" suitable for the purpose. Land therefore can be acquired under section 73 (*a*) as a site for a housing estate whether or not there is already on it a house suitable as a house for the working classes. There is no definition of a house for the working classes in the Act. Schedule 11, paragraph 11 (*e*), contains a definition of "working class," but that is only for the purpose of re-housing by undertakers in case of displacement. By the Housing Act, 1949, all references to the working classes have been expunged from the Act, but it is conceded that the amendment does not affect this action.

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[2] [1932] 2 K.B. 621; 48 T.L.R. 351.

[3] [1952] 1 All E.R. 1318; [1952] W.N. 255.

In *Uttoxeter Urban District Council* v. *Clarke*[4] Lloyd-Jacob J. said[5] that section 79 (4) was "directed to the instance "where the local authority acquires a house for conversion, and "it is by no means obligatory in respect of houses which are "acquired as part of an estate." It is submitted that that is a complete answer to the plaintiff's contention and is based on a true appreciation of the Act. Section 72, read in the light of the decision in *Uttoxeter Urban District Council* v. *Clarke*,[6] provides four alternative methods by which a local authority may provide houses for the working classes; they may do so either by the erection of houses on any land acquired or appropriated by them —which is what the defendants propose to do in this case—or by conversion of buildings, or by acquiring a house suitable for the purpose, or by altering, enlarging or improving any house which has been acquired. Which of those alternative methods they adopt is a matter for the local authority. Section 73 implements and gives a local authority power to carry out the provisions of section 72: it gives two separate powers—(*a*) to acquire land, including any houses, and (*b*) to acquire houses which are, or may be made suitable as, houses for the working classes. It is only if a house is acquired under (*b*) that the provisions of section 79 (4) come into play. In *Conron* v. *London County Council*[7] Peterson J. took the view that section 12 (1) (*a*) of the Housing, Town Planning, etc., Act, 1919, gave a local authority complete control over the area which it proposed to acquire as a housing estate. The defendants in this case have acquired the plaintiff's property under section 73 (*a*) as a site for a housing estate, and have set out to develop it as they thought best. Section 79 (4) has no application, and the method to be employed is a matter for the defendants' discretion.

H. J. Phillimore Q.C. in reply. If the defendants' argument is right it means that a local authority who acquired a house capable of being made into a working class dwelling could say, if they wanted to demolish it, that they had acquired it under section 73

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[4] [1952] 1 All E.R. 1318.

[5] Ibid. 1320.

[6] Ibid.

[7] [1922] 2 Ch. 283, 296.

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(*a*), or, if they wanted to retain it, that it had been acquired under section 73 (*b*). If section 73 gives two distinct powers, how is it to be determined under which power the property has been acquired? The section is not dealing with separate matters but is concerned only with the provision of houses and there is no reason to assume that separate powers are given. On the defendants' view of the Act there is an inconsistency and section 79 makes nonsense, for a house could be pulled down under subsection (1) (*a*) while under subsection (4) it must be repaired. Had Parliament intended to give power to demolish a working class house in an Act dealing with the provision of such houses, they would have said so in clear words.

ORMEROD J. stated the facts and continued: This case resolves itself into the short issue whether, in view of the terms of Part V of the Housing Act, 1936, the defendants are entitled to take possession of the plaintiff's property and to demolish her house in order to carry out such plans as they may have for the development of the site, or whether they have no right to demolish the house. The plaintiff contends that this is a working-class dwelling within the terms of Part V of the Act, and that under the provisions of section 79 (4) the only power which the defendants have (and which, as it is a mandatory section, is a power that they must exercise) is the power to adapt, if adaptation is necessary, the dwelling-house to make it suitable for a dwelling for the working classes.

Part V of the Housing Act, 1936, begins with section 71, a general section giving a local authority power to review the housing conditions in their areas from time to time and to frame proposals for providing such houses as may be found to be necessary on such a review. In order to carry out that section, section 72 provides: "(1) A local authority may provide "housing accommodation for the working classes—(*a*) by the "erection of houses on any land acquired or appropriated by "them; (*b*) by the conversion of any buildings into houses for "the working classes; (*c*) by acquiring houses suitable for the "purpose; (*d*) by altering, enlarging, repairing or improving any "houses which have . . . been acquired by the local authority."

In order to implement section 72, section 73 provides: "A "local authority shall have power under this Part of this Act" —that is Part V—"(*a*) to acquire any land, including any houses "or other buildings thereon, as a site for the erection of houses "for the working classes; (*b*) to acquire any houses or other "buildings which are, or may be made, suitable as houses for the "working classes, together with any lands occupied with such "houses or other buildings, or any estate or interest in such "houses or other buildings and lands." The plaintiff substantially relies on section 79 (4). [His Lordship read section 79 (4) and continued:] The plaintiff's case is that as the land has been acquired compulsorily by the defendants, and as the compulsory purchase order has been approved by the Minister and there has been no appeal, the order cannot be questioned, but that the only duty and the only right which the defendants have in regard to the house is to treat it under section 79 (4) as being a house which is or may be made suitable for the working classes. Her contention is that the defendants' power is restricted and has been sharply defined by the mandatory provision of section 79 (4), so that to deal with the land or the house in any other way is outside the powers given to them by the Act.

If that contention be right it seems to me by no means to follow that the plaintiff would not be compelled to give up possession of the house so that other people, who, in the proper exercise by the local authority of their judgment in these matters, might be considered better entitled to be accommodated, could become tenants of the local authority in that house in place of the plaintiff. However, I do not think that that situation arises, and it is not a matter which it is necessary for me to consider.

The contention of the plaintiff is that this house, being essentially a working-class dwelling, comes within the terms of section 73 (*b*) and therefore must be dealt with under section 79 (4). As I understand it, the argument put forward by Mr. Phillimore is that although section 73 (*a*) gives the local authority power to acquire any land including any houses or other buildings thereon —and, of course, "land" is defined in the Interpretation Act, 1889, as including houses of any tenure—the term "including any "houses or other buildings thereon" does not refer to houses for the working classes but to houses which are either not suitable for the working classes or are not capable of being made suitable for their accommodation, and that, therefore, if the local authority acquire a site which has on it some building which is neither in itself suitable as a working-class dwelling nor capable of being adapted for that purpose, they may in the exercise of their powers in developing the site demolish or deal with that building in any way which they think proper; but that if any house or any building on that site is suitable in itself to be used as a dwelling-house for the working classes, or is capable of being adapted for such purpose, then that building cannot be touched except as to carry out the mandatory provisions of section 79 (4).

In the present case the local authority intend to demolish the house in order to complete a road round the building site which will give access from the main road adjoining the site to all the houses and dwellings on the site. It is clear from section 79 (1) (*a*) that the local authority, if they have acquired land under this part of the Act for the purpose of housing, may lay out and construct public streets, roads or open spaces on the land. Accordingly, on the face of it, if there were no section 73 (*b*) and no section 79 (4) (and, indeed, I think that this position is admitted by Mr. Phillimore), a local authority has the power to demolish houses or buildings on land acquired for the purpose of developing a housing site in order to construct roads or streets on the site, or otherwise develop the site as they in their proper judgment think the most suitable method of development as a housing site. Mr. Phillimore, however, says that if there is a house on that site which is either suitable as a dwelling for the working classes, or capable of being adapted for that purpose, then the local authority exercises its powers, not under section 73 (*a*), but under section 73 (*b*) of the Act; in other words, they have acquired a house or other building which is, or may be made, suitable as a house for the working classes.

The defendants' answer is that section 73 (*a*) is wide in its terms and uses the word "land," which must be interpreted as defined by the Interpretation Act, 1889, and which includes any houses or other buildings thereon. Their contention (and I may say now that it is a contention which I accept) is that the word "houses" in section 73 (*a*) has no restricted meaning such as the plaintiff wishes to put on it, and does not merely refer to houses other than houses suitable for the accommodation of the working classes, but to "houses" generally; and as I read the section those houses may be houses suitable, or capable of being made suitable, for the accommodation of the working classes. The meaning of the word is not restricted in any sense to houses or buildings which either are not working-class houses or could not be made into them.

It is interesting to note that the wording of section 73 (*b*) is "to acquire any houses or other buildings which are, or may be "made, suitable as houses for the working classes," and that section 79 (4) practically adopts the same words and provides: "Where a local authority acquire a house or other building which "can be made suitable as a house for the working classes . . .

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" they shall forthwith proceed to secure the alteration, enlarge-" ment, repair or improvement," and so on. The contention of the defendants is that if a house is acquired under section 73 (*b*) which is suitable to be used as a house for the working classes, or can be made so suitable, then under those circumstances section 79 (4) applies and the local authority must deal with that house in accordance with section 79 (4); but if they acquire a site for the purpose of developing a housing estate, the mere fact that there are buildings already on that site which might be used, or which might be adapted to be used, as working-class dwellings does not in any way restrict the power of the local authority in settling their plans and drawing up their designs for the proper development of that estate.

I have come to the conclusion that that is a proper view to take of section 73 and of section 79 (4), and I am fortified in that view by the decision of Lloyd-Jacob J. in *Uttoxeter Urban District Council* v. *Clarke*,[1] where a very similar point arose. Lloyd-Jacob J. said [2]: " The first defendant's submission is, as " I understand it, that because Heath House itself is a building " on the land compulsorily acquired there is an obligation resting " on the council under section 79 (4) forthwith to secure, by " alteration, enlargement, repair, improvement or adaptation, that " it should be converted into suitable dwellings. That submission, " in my judgment, is erroneous. As I read the section, it is " directed to the instance where the local authority acquires a " house for conversion, and it is by no means obligatory in respect " of houses which are acquired as part of an estate. Accordingly, " I do not think it right to infer that the failure of the council " to convert Heath House into suitable dwellings is in itself an " indication that the avowed purpose of their acquisition, viz., " that it was to be for the purposes of Part V of the Housing Act, " 1936, was erroneous."

That, I think, sums up the position here. The words " As I " read the section, it is directed to the instance where the local " authority acquires a house for conversion, and it is by no means " obligatory in respect of houses which are acquired as part of " an estate," I think cover this situation exactly. I am quite satisfied on the facts put before me that this house was acquired by the local authority as part of a site which was to be developed by them into a housing estate for the housing of the working classes and which has in fact been so developed. It is said that

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[1] [1952] 1 All E.R. 1318.

[2] Ibid. 1320.

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the intention of the Act cannot be such as to give a local authority the power to pull down and demolish working-class dwellings as its object is to ensure the provision of dwellings for the working classes. The evidence before me is that nine houses have been demolished in the development of a site which has resulted in the provision of some 180 dwelling-houses. I am satisfied that the real position is that this land was acquired as a site for the erection of houses for the working classes and that under those circumstances section 79 (4) has no application. Had the house been purchased under section 73 (*b*) as a house either suitable or capable of being adapted for the purpose of dwellings for the working classes it might very well be that the only power which the local authority would have had in relation to it would be to ensure that it was adapted and used for that purpose, but I am satisfied that that was not the case here, and under those circumstances this action must fail.

I may say here I am sure that everyone must have very great sympathy for the plaintiff, who has to leave the house which she and her husband have owned and occupied for a total period of some 30 years. I have no doubt that it has resulted and will result to some extent in hardship for her. It is perhaps unfortunate that from time to time the rights of private individuals have to be sacrificed in the interests of public necessity. It goes without saying that powers such as this should be exercised with the greatest possible care, and it is essential that the court should keep a careful watch on the way in which powers provided by this and similar Acts are exercised. After hearing the whole of the evidence, and having given the most careful attention I could to the arguments which have been put forward by the plaintiff, I am satisfied that, hard as it may be on her, there was a proper exercise in the course of their public duty by the defendants of their powers under the Act, and there must therefore be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Hamlins, Grammer & Hamlin for A. E. Hamlin, Sheringham; Solicitor, London County Council.*

J. F. L.

[redacted]

KWEI TEK CHAO AND OTHERS (TRADING AS ZUNG FU CO.) *v.* BRITISH TRADERS AND SHIPPERS LD. N. V. HANDELSMAATSCHAPPIJ J. SMITS IMPORT-EXPORT, THIRD PARTY.

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Jan. 20, 21, 22, 25, 26, 27, 28, 29;
Feb. 1;
July 26, 27.

Devlin J.

[1953 C. No. 1245.]

Sale of Goods—C.i.f.—Date of shipment—Goods shipped late—Bill of lading date inaccurate—Goods retained by buyer after knowledge of late shipment—Sub-sale—Loss of profits—Contemplation of parties—Forged bill of lading—Date forged—Whether bill of lading a nullity—Loss of right to reject—Measure of damages—When goods "delivered"—Effect of pledge of goods—Effect of transfer under string contract—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 35.
Shipping—Bill of lading. Damages. "Delivery." Contract—Fraud—Avoidance—Election to affirm—Lapse of time between discovery of fraud and avoidance. Fraud—Vicarious liability—Forgery by sellers' shipping agent.

London exporters contracted under a c.i.f. contract to sell to merchants in Hongkong a quantity of chemical known as Rongalite C., shipment to take place not later than October 31, 1951, payment to be against letter of credit on production of "shipped" bills of lading at the buyers' bank. The buyers contracted to resell the goods to other merchants in Hongkong. The goods were not shipped until November 3, 1951, but on November 10 the sellers presented to the buyers' bank bills of lading purporting to show that shipment had been made on October 31. The bank paid the price. In fact words in the bills of lading relating to the date of shipment had been forged by the sellers' forwarding agents at the port of loading after the issue of the bills of lading, but the sellers were not responsible for and had no knowledge of the forgery. Owing to the late shipment of the goods the buyers lost their contract for resale in Hongkong, but although they knew before the goods arrived (on December 17) that shipment had not been made until after October 31 they took the goods from the ship, putting them into a go-down and giving the go-down warrants to the bank as their security. The buyers subsequently discovered (by April, 1952), that the bills of lading had been forged. They were unable to sell the goods owing to a serious fall in the market price in Hongkong, and they issued a writ against the sellers in March, 1953.

The buyers sued the sellers for return of the price, claiming that it was the foundation of the contract that true, accurate and genuine bills of lading should be presented; that the bills of lading, being forged, were a nullity, and that the consideration had wholly failed; alternatively they claimed damages for breach of contract and loss of profit:—

Held, (1) that the sellers were not liable for the fraud of their

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

forwarding agents; they (the sellers) were the people on whom in the first instance the fraud was practised.

In re Hampshire Land Co. [1896] 2 Ch. 743; 12 T.L.R. 517 and *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.* [1928] A.C. 1; 44 T.L.R. 76 applied.

Held, (2) that, even if fraud were proved, the buyers had not rejected the goods until the issue of the writ, and the lapse of time meanwhile was so great as to be conclusive that an election had been made to affirm the contract; and that they were not accordingly entitled to recover the price as money paid for a consideration which had wholly failed.

Clough v. *London and North Western Railway Co.* (1871) L.R. 7 Exch. 26 applied.

Held, (3) that the forgery, though a material alteration, did not render each bill of lading a nullity, as it did not go to the essence of the document, the primary purpose of the bill of lading being to evidence a contract of affreightment and to enable the buyer to remove the goods from the ship; and that the buyers' claim for the price, as for a consideration which had wholly failed, was bad in law and in fact, and must fail.

Held, (4) that under a c.i.f. contract a buyer had a right to reject the documents and a right to reject the goods, those rights being separate and distinct in law, and his right to damages on a breach of the seller's obligation to present a correct bill of lading vested when the bill was tendered; that that right could not be affected by any action the buyer might take on a subsequent breach by the seller to deliver goods in accordance with the contract, whether the buyer elected to treat the subsequent breach as a breach of condition or as a breach of warranty; and that the damages were not therefore limited to the difference in value, if any, between an October shipment and a November shipment. The true measure of damage was the difference between the contract price and the market price of the goods.

James Finlay & Co. Ld. v. *N. V. Kwik Hoo Tong H.M.* [1929] 1 K.B. 400; 45 T.L.R. 149 applied.

Held, (5) that the sellers' knowledge that the buyer was buying generally for resale did not exclude the ordinary measure of damage based on market price; it was only where it was contemplated that in the case of non-delivery the buyer would not be able to replace the goods by a purchase on the market that the sub-sale could be relevant.

Held, (6) that in the circumstances of the present case the measure of damage was the difference between the contract price and the value of the goods, not at the date of tender (November 10) but when the buyers discovered the sellers' breach of their obligation, which was not later than December 17, 1951. As at that date the goods were virtually unsaleable the buyers were entitled to damages calculated on the basis of the difference between the contract price of £590 per ton less the salvage value of the goods, namely, £70 per ton, upon the contract quantity of 20 tons (see p. 491 et seq., post).

Per curiam. Under a c.i.f. contract, if the property passes when the documents are transferred, that property is subject to the

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condition that the goods should revest in the seller if on examination by the buyer he finds them not to be in accordance with the contract. No dealing by the buyer is an act inconsistent with the seller's ownership, within the meaning of section 35 of the Sale of Goods Act, 1893, so that the buyer loses his right to reject the goods, unless he deals with something more than his conditional property, as by dispatch of the goods to a third party, but not a mere transfer of documents under a string contract or a pledge of the goods.

Hardy & Co. (London) Ld. v. *Hillerns and Fowler* [1923] 2 K.B. 490; 39 T.L.R. 547 considered.

ACTION.

In August, 1951, the defendants, British Traders and Shippers Ld., importers and exporters, carrying on business in London, agreed to sell, and the plaintiffs, Kwei Tek Chao and others (trading as Zung Foo Co.), merchants carrying on business in Hongkong, to buy, 20 tons of Rongalite C. lumps, a chemical of Swedish origin then in great demand on the China mainland, to be shipped from a continental port c.i.f. Hongkong with payment against confirmed letter of credit against the defendants' draft, drawn upon the plaintiffs payable 60 days after sight, accompanied by on board bills of lading and shippers' documents. The original time contemplated for delivery was four to six weeks. The plaintiffs duly instructed their bank, the Mercantile Bank of India, to open the letter of credit, the bills of lading to be held by the bank, the plaintiff giving the bank a pledge of the goods for the amount of the advance.

In order to fulfil their contract with the plaintiffs, on August 23, 1951, the defendants agreed to buy from the third party, N. V. Handelsmaatschappij J. Smits Import-Export (hereinafter referred to as Smits), a Dutch firm, the Rongalite, f.o.b. Rotterdam for export to Hongkong, delivery to be effected in two to three weeks from the date of the contract. Subsequently the port was changed to Antwerp, payment to be by letter of credit drawn upon the defendants on a bank in Sweden against shipping documents. The time for delivery at the port was extended.

On August 27 the plaintiffs in Hongkong entered into a contract to resell the goods to a Hongkong firm, Nam Hua, c.i.f. Hongkong, shipment four to six weeks after the date of the contract, payment to be against a go-down warrant.

Owing to difficulties in obtaining the goods and booking shipping space the defendants asked the plaintiffs to accept later shipment. The plaintiffs consulted Nam Hua who, as the market was falling, insisted on October 31, 1951, as the latest date for

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shipment. The plaintiffs accordingly informed the defendants that although they would extend the time for negotiating credits shipment must be made in October. This information was passed on by the defendants to Smits, who were providing the goods. They also informed their forwarding agents, Slootmakers, who were endeavouring to find shipping, and eventually Slootmakers informed the defendants that shipping space had been obtained on the *M.V. Tarn*, advertised to arrive at Antwerp on October 31 and to sail from there on November 2, but they warned the defendants of possible delays in arrival owing to weather conditions. On October 11 the defendants informed Slootmakers that shipment must be effected by October 31. On October 17 Smits informed the defendants that the *Tarn* would definitely be loading at Antwerp in October and guaranteed October bills of lading. On the following day the defendants sent Slootmakers the shipping documents and their instructions were to call the consignment forward and " take out bills of lading on our behalf. . . . Bill of " lading to be dated not later than 31st October. . . . Clean bill " of lading evidencing goods ' shipped on board.' "

The goods were on the quay at Antwerp on October 31, but the *Tarn* did not arrive there until the early morning of November 1 and the goods were not in fact loaded until November 3, when the bills of lading were handed over to shipping agents acting for Smits. The words of the bills of lading which had been issued were qualified by inserting above the clause beginning " shipped " the words " received for shipment and since," so that the clause read " received for shipment and since " shipped 31st October." The additional words were, however, deleted sometime before November 6. On November 5, Slootmakers informed the defendants that the goods had been shipped on the *Tarn* and the original bills of lading and copies had been handed over to Smits. Smits presented the bills of lading to the bank in Sweden where the defendants had opened a credit and obtained payment upon them. In due course the defendants' bank presented the documents to the plaintiffs' bank (on November 10) and on November 12 were paid the sum due under the letter of credit arranged by the plaintiffs. On November 15 the defendants wired the plaintiffs " Rongalite shipped *Tarn* 31st. " Documents presented 10th." On November 19 the documents arrived in Hongkong and two days later the bills of lading were presented by the Mercantile Bank to the plaintiffs, who accepted them.

bills of lading
received the
plff. buyer
on 21st Nov.
∴ the right to
reject @ date
vested in them
on that date.

Towards the end of November, Nam Hua ascertained that the *Tarn* had not called at Antwerp until November 1, and on December 1 wrote to the plaintiffs informing them of that fact and requesting the cancellation of his contract with the plaintiffs to buy the Rongalite as shipment could obviously not have been made in October as specified by him. The plaintiffs confirmed with shipping agents that the *Tarn* did not arrive at Antwerp until November 1. On December 17, the goods arrived at Hongkong and the plaintiffs took delivery on behalf of their bank; the goods were put into a go-down and the go-down warrants obtained handed to the bank, being retained by the bank as security.

Meanwhile, the market for Rongalite in Hongkong had fallen in September and October, and had further fallen severely due to an embargo placed about November or December by the Chinese upon its entering the mainland. Large quantities had been imported into Hongkong and there was no demand, and on January 25, 1952, the plaintiffs' efforts to induce Nam Hua to take up the contract goods having failed, they recognized his revocation of their contract.

In February, 1952, the plaintiffs having satisfied themselves that the bills of lading had been forged, instructed solicitors who wrote to the defendants on February 29, alleging forgery and breach of contract and stating that " our instructions are, there-" fore, to hold you responsible for damages arising out of your " breach of contract." On March 18, 1952, the defendants' solicitors replied denying breach of contract or knowledge of the forgery, or of the fact that the *Tarn* had not arrived at Antwerp until after October 31, 1951, or that the goods had not been shipped on that date. By April 15, 1952, Martin Sulke, a partner in the plaintiff firm, ascertained beyond all doubt that the bills of lading had been forged and the nature of the forgery. The plaintiffs did not begin proceedings against the defendants until March 18, 1953.

The plaintiffs claimed that it was the foundation, or alternatively, an implied condition of their contract with the defendants that true, accurate and genuine bills of lading should be presented by the defendants, and they alleged that by reason of the forgery the bills of lading were a nullity and of no effect, so that no money became payable to the defendants under the contract. They claimed the return of the price, £11,800, as money had and received to the use of the plaintiffs on a consideration which had wholly failed, alternatively, they claimed that sum as damages for fraudulent misrepresentation, or, in the further alternative, as damages for breach of contract. They further claimed loss of profits.

The defendants denied the allegations; alternatively they alleged that any breach of contract had been waived by the plaintiffs by accepting delivery of the goods from the ship and by Sulke endorsing the bills of lading; they further contended that by retaining the goods at Hongkong and by their failure to reject within a reasonable time the plaintiffs had lost the right to treat the contract as a nullity, or to treat any breach as other than a breach of warranty.

The defendants brought Smits in as third party, claiming that if there was any delay in delivering the goods, or if the bills of lading were not genuine or true and accurate they were entitled to be indemnified by them against the plaintiffs' claim. The third party denied liability, but before the trial they indicated through their counsel that they would call no evidence nor examine witnesses, and would accept for the purposes of the issue between the defendants and themselves whatever facts were found upon the issue between the plaintiffs and the defendants.

Ashe Lincoln Q.C. and *George J. Webber* for the plaintiffs. This was a contract for an October shipment and a true "shipped" bill of lading dated October, 1951. The plaintiffs did not obtain what they contracted for and, therefore, the consideration having wholly failed, they are entitled to bring an action for the money paid as money had and received to the use of the plaintiffs. The plaintiffs retain this right so long as there has been no complete acceptance with full knowledge of and acquiescence in the breaches of contract. Where documents under a c.i.f. contract have been delivered to the buyer who has accepted them, there is an acceptance, but such acceptance is vitiated by fraud: *Clough* v. *London and North Western Railway Co.*[1] In any event, the question of acceptance never arises if the buyer obtains something other than that for which he contracted. It is submitted that in this case the property never passed to the plaintiffs. The usual practice in a c.i.f. contract is to hand over the bill of lading as showing an intention to pass the title to the property. Where the bill of lading is a forgery it is null and void: *Kreditbank Cassel G.m.b.H.* v. *Schenkers*,[2] *per* Bankes L.J.[3] As the bills of lading were forged the documents each

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[1] (1871) L.R. 7 Exch. 26.

[2] [1927] 1 K.B. 826; 43 T.L.R 237.

[3] [1927] 1 K.B. 826, 835.

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became a nullity and therefore no property ever passed to the plaintiffs.

[Devlin J. Is there authority for that proposition nearer than *Kreditbank Cassel G.m.b.H.* v. *Schenkers*[4]?]

There appears to be no authority other than that case on the effect of a forged document, but it is clear from dicta in other cases that that effect is not limited to cases where the signature of a document is forged: see, for example, *Guaranty Trust Co. of New York* v. *Hannay & Co.*,[5] *per* Bailhache J.[6] In that case, where there was a forged bill of lading, the actual forgery consisted in an allegation that 1,000 bales of cotton had been sent while in fact none had been sent. In the present case it is submitted that the whole import of the bills was forged and that therefore the whole of each document becomes a nullity.

[Devlin J. Does your argument mean that if a person presents the bill to the master of the ship he can refuse to deliver the goods?]

Yes; and it is submitted that he is entitled to hold the shippers responsible.

[Devlin J. You do not require any authority to support the proposition that if the bill of lading is a fictitious document it is a nullity, but if an alteration is made after signature it is only material as far as the parties to the contract are concerned.]

Each bill as originally made out was not a forged document. Once, however, it was altered so as to change the whole purport of the document it became a fictitious document making a number of false representations and therefore it is a nullity for all purposes. If a question were to arise on the contract of affreightment the shipper could only maintain an action against the shipowner on the original bill of lading. Therefore, if, as is submitted, the bill being a forgery is null and void, the effect in this case between the buyer and the seller is that the property can never have passed. The whole transaction was tainted with forgery. [Reference was made to *Rowland* v. *Divall*[7]; Scrutton on Charterparties, 15th ed., p. 191, note X, and Russell on Crimes, 10th ed., vol. 2, p. 1465.] If that be so it does not matter that the plaintiffs retained the goods because the property never having passed they were merely bailees.

If that point is wrong, it is submitted next that there was fraud by the defendants, their servants or agents; that the defendants are responsible for the fraud; and that the plaintiffs were entitled to rescind the contract since they did not obtain what they contracted for. It does not lie in the mouth of a person to say: "By my fraud I have induced you to take the goods "and you are under an obligation to accept them and your only "remedy is in damages." The parties must be put in statu quo ante. *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*[8] sounded in damages because there the plaintiffs had disposed of the goods before they knew of the breach of contract, but it is submitted that if in that case the goods had not been disposed of the plaintiffs would have been entitled to return the goods and to recover back the money they had paid to the sellers. Lapse of time cannot affect the position provided that nothing is done to affirm the contract: *Clough* v. *London and North Western Railway Co.*[9] Here the plaintiffs did nothing to affirm the contract and they are therefore entitled to rescind and to be put back into their original position. Charges of fraud and forgery take time to investigate. The plaintiffs made their election when they informed the defendants that they held them responsible for the fraud; alternatively when they issued the writ. Notwithstanding the lapse of time they are entitled to rescind the contract.

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[4] [1927] 1 K.B. 826.

[5] [1918] 1 K.B. 43; 33 T.L.R. 559.

[6] [1918] 1 K.B. 43, 53.

[7] [1923] 2 K.B. 500.

Even if there was no fraud in this case, there was clearly a breach of a condition precedent and the decision in *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*[10] applies. If it be held upon the effect of all the documents that there was no rejection within a reasonable time and no fraud, then it is submitted that the plaintiffs are entitled to damages for breach of a condition precedent on the basis of that case. In any event the plaintiffs are entitled to damages for loss of profits on their contract with Nam Hua. The contract with Nam Hua was for specific goods; the contract goods were appropriated thereto. The defendants knew that the goods were for re-sale and that an October shipment had a special value to the plaintiffs.

E. W. Roskill Q.C. and *G. G. Honeyman* for the defendants. The question of nullity of the bills of lading cannot arise in this case. The primary purpose of a bill of lading is to evidence a contract of affreightment between the buyer and the seller. It is a document of title enabling the buyer to take the goods from the ship. The date of shipment is merely descriptive of the goods, and the fact that it is incorrect cannot affect the bill as a document of title.

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[8] [1929] 1 K.B. 400; 45 T.L.R. 149.

[9] L.R. 7 Exch. 26.

[10] [1929] 1 K.B. 400.

In a c.i.f. contract there cannot be a total failure of consideration once the buyers have accepted the documents. Therefore the plaintiffs are not entitled to recover the money paid to the sellers as for a consideration which has wholly failed. A breach of the term of the contract gives a right to damages. Had the plaintiffs thrown back the bill as soon as they knew of the breach they would have been entitled to damages for breach of condition. They did not do that and therefore they can only claim damages for breach of warranty. No claim on that basis was made until amendment at the trial and that affects the damages.

If there was fraud, the plaintiffs lost their right to rescind the contract by failing to make their election within a reasonable time: *Clough* v. *London and North Western Railway Co.*[11] The defendants cannot be held liable for the fraudulent acts of the third party who were not their servants, nor for the acts of the shipping agents who were not the servants of the defendants and whose authority was limited to procuring the bill of lading and passing it to the third party.

If it be held that the defendants are liable for failing to ship the goods in October, then it is submitted that the plaintiffs are entitled only to nominal damages: *Taylor & Sons Ld.* v. *Bank of Athens.*[12] If it be held that the defendants were in breach of their obligation by failing to submit an accurate bill of lading, then it is submitted that the breach was waived when the plaintiffs accepted the goods with knowledge of the breach and that they are entitled to nominal damages only.

[Devlin J. Waiver can either be of a breach of contract in the sense that it is an abandonment of a claim to relief, or waiver of a breach of condition, turning the condition into a warranty, that is to say, election.]

Reliance is placed on both. In a c.i.f. contract the property passes to the buyers when the documents are accepted subject to their right to reject the goods if they do not conform to the contract description. A term in a bill of lading as to shipment is as much a part of the description of the goods as the nature of the goods themselves. Therefore, in this case, the plaintiffs could have avoided the whole transaction immediately they knew that the bill of lading was incorrect. By accepting the goods

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[11] L.R. 7 Exch. 26.

[12] (1922) 27 Com.Cas. 142.

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they waived their right to reject and are now only entitled to seek damages for breach of warranty. The nature of the acts which can amount to an entire abandonment of rights to relief under a contract are illustrated in the deviation cases. There must be an unequivocal act done with knowledge of the breach: *Hain S.S. Co.* v. *Tate and Lyle.*[13] In this case the plaintiffs accepted the goods. They then had the knowledge or the means of knowledge that the ship had not been at Antwerp in October and therefore they must have known that the bill of lading was inaccurate. Nevertheless they indorsed the bill of lading and took delivery of the goods, renewing their pledge to the bank. It was only when they found that they could not dispose of the goods because of the fall in the market price that they made their accusations against the defendants. Alternatively, if it be held that their acts did not amount to waiver in the sense of abandonment, it is submitted that by their conduct in accepting the goods with knowledge of the breach they elected to treat the breach of condition as a breach of a warranty.

[DEVLIN J. Had the plaintiffs a right to reject, having already pledged the goods to the bank?]

Yes; otherwise section 35 of the Sale of Goods Act, 1893, could not apply to a c.i.f. contract under which there is a double obligation to tender documents and to provide goods of the contract description. Once the documents are exchanged the property in the goods passes conditionally subject to the buyers' right to examine and reject the goods for fault. In this case the plaintiffs pledged the documents to the bank. That would seem to be an act consistent only with their ownership, but it is submitted that as a matter of principle that was not an act constituting acceptance under section 35 of the Act, depriving them of the right to reject. There is no authority on the point other than a passage in Halsbury's Laws of England, 2nd ed., vol. 29, p. 224, para. 297, which was contributed by Scott L.J. In that passage Scott L.J. seems to think that a mere dealing with the documents in a c.i.f. contract cannot constitute an acceptance under section 35. The note comments favourably on that statement and cites *Hardy & Co. (London) Ld.* v. *Hillerns and Fowler*[14] in support thereof, but that case does not bear out the proposition as in that case there was a physical dealing with the goods as well as with the documents. It is not submitted in the present case that the plaintiffs lost their right to reject by their original pledge to the bank, but it is submitted that they did so when, having learned of the true sailing date of the *Tarn* they took delivery of the goods, i.e., physically took possession of them and continued to try to dispose of them, having renewed their pledge to the bank with knowledge of the defect in the bills of lading. That was an act constituting an acceptance under section 35.

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[13] (1934) 39 Com.Cas. 103; 50 T.L.R. 415.

[14] [1923] 2 K.B. 490; 39 T.L.R. 547.

As to the measure of damages, it is submitted that the plaintiffs have suffered no damage by reason of the defendants' default. By their own acts the plaintiffs lost their right to reject and all the subsequent damage flowed therefrom and they are therefore entitled to nominal damages only. *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*[15] can be distinguished on its facts and can have no application in this case. There the buyers under a c.i.f. contract accepted a forged bill of lading and subsequently, without knowledge of the forgery, took delivery of the goods and disposed of them. Evidence was given in that case that the buyers, had they known that the bill was forged, would have stopped payment under the contract and rejected the goods. Wright J. awarded damages to the plaintiffs in that case for the loss of their right to reject, based on the difference between the contract price and the market price, and his decision was upheld by the Court of Appeal. In the present case there is no doubt on the evidence that the plaintiffs, through Sulke, knew that the bill of lading was incorrect, but nevertheless they proceeded to take delivery of the goods and to try to dispose of them. Their knowledge must affect the measure of damages and have the effect of turning the breach of condition into a breach of warranty.

Should those arguments be rejected, it is submitted that the plaintiffs cannot recover damages for loss of profits on the contract with Nam Hua. That contract was an "ex-godown" contract for unascertained goods and the plaintiffs could have bought in to satisfy that contract: *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*[16] [Reference was also made to *Bowes* v. *Shand*[17]; *Shipton, Anderson & Co.* v. *Harrison Brothers & Co.'s Arbitration, In re*[18]; and *Ross T. Smyth & Co. Ld.* v. *Bailey & Son Ld.*[19]]

Michael Kerr for the third party.

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[15] [1929] 1 K.B. 400.

[16] [1928] A.C. 1; 44 T.L.R. 76.

[17] (1877) 2 App.Cas. 455.

[18] [1915] 3 K.B. 676; 31 T.L.R. 598.

[19] (1940) 56 T.L.R. 825; [1940] 3 All E.R. 60.

Ashe Lincoln Q.C. in reply. It is fallacious to argue on the basis of acceptance. It is true that some goods came into the plaintiffs' possession and in those circumstances the law presumes that there may be a quasi-contractual right in the defendants to recover the price of the goods which have not been returned, but that right is not under the contract and it does not destroy the fact that under the contract there has been a total failure of consideration.

[DEVLIN J. What is the function of section 35 of the Sale of Goods Act?]

That section deals only with acceptance under the contract, i.e., where something has been sent under a contract by the seller and the purchaser has taken delivery of it. The section can have no application if the goods sent do not conform to the contract. If the buyer obtains something other than that for which he contracted the contract is never executed.

DEVLIN J. stated the facts, found that the forgery was committed by Smits or by someone on their behalf; and that there was a conspiracy, to which Slootmakers, the defendants' forwarding agents, were a party and in which they assisted by their conduct in dealing with the non-negotiable copies of the bills of lading. He continued: What is the result of that in law? It is suggested that Slootmakers being the agents of the defendants, the defendants are responsible for their fraud, but that is stating the matter far too broadly. No doubt, if Slootmakers had been the defendants' servants, that might have been the case. Any act done by a servant in the course of his employment, even if it be for his own benefit, is one for which his employers must answer. But it cannot be said that Slootmakers were servants; they were agents, and therefore the question is whether they committed an act in the course of the authority which they had. I do not suppose that there would be any doubt, for example, that if Slootmakers had made fraudulent representations to Wilhelmson, the agent of the shipping company, in order to procure the bills of lading, the defendants would have been liable although they had not expressly authorized it, because Slootmakers would have been doing improperly the very act which they had been authorized to do; but that is not the question which I have to consider.

The fraud alleged against the defendants is that they fraudulently presented the bills of lading, and thereby made a fraudulent representation that the bills of lading were genuine, and a representation about the shipping date. A limited company has to act through agents, and if the person who presents the bills of lading knows that they are untrue and he is an agent, that is an end of the matter; but that is not suggested here. The person who presented the bills of lading and made the representation upon which the credit was obtained was Barclays Bank, and no one suggests that the bank was fraudulent.

The question then is, did some other agent of the defendants have knowledge of the true state of the facts, and not merely knowledge of the true state of the facts, but guilty knowledge, that is to say, knowledge that the representation was false, and that the facts upon which it was founded were false, and that it was going to be made for the purpose of deceit? I think that Slootmakers had that knowledge.

The next question is: is Slootmakers' knowledge the knowledge of the defendants? It is only by showing that Slootmakers' knowledge is the knowledge of the defendants that fraud can be proved against the defendants. In my judgment Slootmakers' knowledge is not the knowledge of the defendants, and I do not need to decide that by asking myself whether knowledge acquired by an agent in these circumstances in regard to such a matter is normally knowledge within the knowledge of the defendants, because there is here a special principle which applies to exclude it. On the findings which I have already made the defendants were innocent of fraud, or of any complicity in the fraud. It follows, therefore, that they were the people upon whom in the first instance the fraud was being practised, and Slootmakers were, by making themselves a party to the forgery of the bills of lading, deceiving their own employers. It makes no difference that the employers might pass it on to the plaintiffs, and that they in turn might pass it on to somebody else. If the fraud had been discovered on November 9, obviously it would have been the defendants, and they alone, who, having parted with their money, would have suffered by it.

In those circumstances the principle which has to be applied is that which was first formulated by Vaughan Williams L.J. in *In re Hampshire Land Co.*,[1] and I take the statement of it from its incorporation in the speech of Lord Dunedin in *Houghton* v. *Nothard Lowe and Wills*,[2] where it received the approval of the House of Lords. It is this: "If Wills had been guilty of a fraud,

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[1] [1896] 2 Ch. 743; 12 T.L.R. 517.

[2] [1928] A.C. 1; 44 T.L.R. 76.

"the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of "the society of the facts constituting that fraud; because common "sense at once leads one to the conclusion that it would be "impossible to infer that the duty, either of giving or receiving "notice, will be fulfilled where the common agent is himself "guilty of fraud. It seems to me that if you assume here that "Wills was guilty of irregularity—a breach of duty in respect of "these transactions—the same inference is to be drawn as if he "had been guilty of fraud. I do not know, I am sure, whether he "was guilty of actual fraud; but whether his conduct amounted "to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under "the circumstances, the knowledge of the company."

In these circumstances I hold that the charge of fraud, whether it be personal fraud or fraud through the agency of Slootmakers, has not been made out, and I must therefore deal with the other matters on which the plaintiffs rely.

The most convenient point at which to begin is with the question whether it is now open to the plaintiffs, having regard to their conduct after the delivery of the goods in Hongkong, to have the transaction set aside and to recover their money as money paid for a consideration which has wholly failed. There is no dispute that, if this contract called for shipment by October 31, the contract has been broken; that an essential condition of the contract has been broken, that the date of shipment is part of the description of the goods, and that therefore a failure to deliver goods of an October shipment means that there has been a breach of a condition which would give the buyers the right to elect to rescind the contract.

Fraud being out of the case, the perhaps greater latitude which is accorded to a buyer or a party aggrieved when the other party has been fraudulent—the latitude in making up his mind whether he is going to affirm the transaction or not—may not strictly be in point; but I think that it is desirable that I should deal with it, because the other ways in which the case has been put show that the question may not be the bare question under the Sale of Goods Act, 1893, of whether or not a man has the right to reject, but the broader question as to the period of time within which a man has the right to make his election to affirm or avoid a voidable transaction.

The first thing is to inquire what the act is upon which the plaintiffs rely as being an act of rejection or rescission of the transaction. They rely upon two acts, and two only, the first being the letter of February 29, 1952, and the second the claim made on the writ, which was not issued until March 18, 1953, a year later. Therefore one has to ask first whether the letter of February 29 amounts to a rejection or to a decision to avoid the transaction, claiming the return of the money, with the consequence that the property goes back to where it belonged. I confess that I am quite unable to follow the argument that the letter of February 29 was a rejection of the goods or an avoidance of the transaction. It is true that it makes a complaint, and states that the defendants will be held responsible, but the essence of the matter is, what form of relief is to be claimed? I do not know whether the writers of the letter were seeking to do anything more than simply to formulate a complaint, but the natural interpretation that would be put upon it if it is a choice between one thing and another is that the plaintiffs are choosing to affirm the transaction and to claim damages. There is not a word about rejection or about the goods going back. It states: "As a result "of the breach of contract there has resulted serious damage to "our clients . . . our instructions are, therefore, to hold you "responsible for damages arising out of your breach of contract."

I suppose it is true that on the basis of rejection there could be a claim for damages for loss of profit, but I should have thought that the letter would naturally suggest to anybody, when taken in conjunction with the fact that until then they had acted as if they were going to affirm the transaction by taking delivery of the goods, putting them in a go-down, and taking a go-down warrant, that the plaintiffs were proposing to affirm the contract and to seek their remedy by claiming damages in relation to the market value of the goods themselves. I am not sure that the recipient of that letter might not have been justified in inferring that the plaintiffs were making an election to affirm the contract, but it is not put as high as that, and it is sufficient for me to say that I cannot possibly regard it as being an election to reject. It follows, therefore, that between that time and the issue of the writ there was no act of rejection which can be relied upon, so that the rejection which is relied upon is the issue of the writ on March 18, 1953.

It is, I think, fair to say that Sulke had the material which would have enabled him to reject as early as December 12, 1951. He knew by that date that the ship had not sailed or had not been loaded on October 31, because she had not called at Antwerp until November 1. It is fair to say that he was not quite in the position to make his rejection on that information alone, because his rights might depend, and indeed the arguments in this case show that they might certainly depend, upon whether or not the bills of lading were correct or incorrect, and he perhaps needed more time to make up his mind about that. But he knew by December 12 that the goods were not on the ship on October 31; by the middle of January, 1952, he knew, or perhaps it is fairer to say that he suspected, that there was something wrong with the bills of lading. By February 29, 1952, those advising him were sufficiently clear in their minds to formulate a precise charge that the bills of lading had been forged; and on April 15 he was told in detail by the shipping company that they had examined the originals of the bills of lading and that they had been forged. I find difficulty in seeing anything in the argument that after April 15, 1952, he needed any further time for making inquiries.

To make up his mind as to what he was going to do, Sulke did not really need to know much more than that there had been incorrect bills of lading. One must make allowances for the fact that he needed time to consult his solicitors, and for the fact that he was entitled to try and do the best he could to press his buyers to take the goods, but his efforts had failed by January 25, 1952, and by April 15 he knew beyond any doubt that there had been forgery. Nothing whatever was done until March 18, 1953, and no explanation has been given as to how the time between these dates was occupied, except for a suggestion that the matter was passing between London and Hongkong, and that there were handwriting experts at work on the bills of lading.

The test in the case of fraud is that laid down in *Clough* v. *London and North Western Railway Co.*[3]; the essence of that case is that there is no immediate necessity in the case of fraud to make an election at once, and within certain limits a man may keep the situation open, provided that he does nothing to affirm the contract. Differing from the decision in the court below, Mellor J., in the Exchequer Chamber, said[4]: "We differ from them in this, that we think the party defrauded "may keep the question open so long as he does nothing to "affirm the contract." Later, he said[5]: "We think that so "long as he has made no election he retains the right to deter-"mine it either way . . . ;" and later: "And lapse of time

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[3] (1871) L.R. 7 Ex. 26.

[4] Ibid. 34.

[5] Ibid. 35.

"without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."

In all the circumstances of the present case, having regard to the fact that the goods had been dealt with, and if anything was to be made of them at all they would have to be marketed, and markets might be falling and changing, the lapse of time, which amounts to nearly 15 months, is so great as to be conclusive, even if fraud were proved, that an election had been made to affirm the contract. If the test be the simpler one under the Sale of Goods Act, 1893, then Mr. Ashe Lincoln concedes that if the letter of February 29 was not a rejection, the plaintiffs must be held to have affirmed the contract and elected to keep the goods.

It is with that background that one has to consider the claim made by the plaintiffs for the return of their money. It is put as a claim for a consideration that has wholly failed, and I confess that I am not quite able to understand how that differs from a claim made in the ordinary way under the Sale of Goods Act, 1893, where there has been a rejection. Of course, if goods have been properly rejected, and the price has already been paid in advance, the proper way of recovering the money back is by an action for money paid for a consideration which has wholly failed, i.e., money had and received; but that form of action is governed by exactly the same rules with regard to affirming or avoiding the transaction as in any other case.

The principal element relied upon by Mr. Ashe Lincoln for the plaintiffs is the claim that the bills of lading, because they were forged, were a nullity. Mr. Roskill contests that. He submits that although there has been a material alteration, that does not necessarily make the bills of lading a nullity. He argues that the bills still evidence the primary thing, the contract of affreightment, although the description of the way in which the goods were put on board, and the date on which they were put on board are incorrect, but they are still documents of title which would entitle the holder to take the goods from the ship.

There does not seem to be any authority precisely in point, and Mr. Ashe Lincoln has relied upon broad statements, in *Kreditbank Cassel G.m.b.H.* v. *Schenkers Ld.*[6] in particular, that a forged document is null and void. In that case Bankes L.J.

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[6] [1927] 1 K.B. 826; 43 T.L.R. 237.

said[7]: "To mere irregularities the principle of [*Mahony* v. "*East Holyford Mining Co.*[8]] no doubt applies, but it has never "been extended to forgery, a forged instrument being simply "null and void." But such general dicta must be related to the circumstances in which they are made. If somebody forges the signature to a document, that document is wholly fictitious from beginning to end, and it is of course null and void as soon as forgery is proved; but I do not think that that is any authority for the view that any material alteration to a document destroys it and renders it null and void.

Deciding the matter in the absence of authority and on principle, I think that the true view is that one must examine the nature of the alteration and see whether it goes to the whole or to the essence of the instrument or not. If it does, and if the forgery corrupts the whole of the instrument or its heart, then the instrument is destroyed; but if it corrupts merely a limb, the instrument remains alive, though no doubt defective. For example, if a man adds two noughts to a cheque, that is the end of it. It is no longer a cheque for, let us say, £10, because the original figure of £10 has been destroyed by the addition of the two noughts. It is not a cheque for £1,000 because the figure of £1,000 is a forged figure. There is, therefore, nothing left of it, and it must go. The same result would not necessarily follow, however, if a man were, for example, to forge the date on a cheque, because he thought that, it being overdue, there was a possibility that awkward questions might be asked.

Accordingly, in my judgment, the bills of lading in the present case were not a nullity, and Mr. Roskill's submission upon that point is right. But, even if it were not so, it would not alter the conclusion which I have reached. If the bills of lading are a nullity, no doubt the property does not pass by their tender, but if a man, with knowledge of a bill of lading and the fact that it is a nullity, takes delivery of the goods, acts upon it and keeps them, it is not then open to him to avoid the transaction. The question is simply this: is the transaction void ab initio or is it voidable? If it is void ab initio, the seller can avoid it or set it aside as well as the buyer. If it is only voidable, that gives an election to the buyer, who, if he wishes to reject, must do so within a reasonable time. Mr. Ashe Lincoln argued that as the bills of lading did not pass the property they were null and void from beginning to end, no question of rejection could ever arise, and at any time, apparently, their nullity could be decreed. It is interesting to observe that that was not the course taken in *Rowland* v. *Divall*,[9] which was cited to me by Mr. Ashe Lincoln as being a comparable case. In that case the seller had sold, or purported to sell, a motor-car to which he had no title and, accordingly, the property could not have passed. When the buyer sought the return of his money as for a total failure of consideration, it was suggested that he had used the car for some time, and that, therefore, the consideration had not totally failed. In that case quite plainly the property could not have passed, and therefore, if Mr. Ashe Lincoln's argument is right, it could have been decided simply by saying that the property had not passed, and the buyer was entitled to have his money back because the transaction was void. But it was not decided on that basis but as a claim made for breach of an implied condition on the part of the seller that he had the right to sell the goods.

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[7] [1927] 1 K.B. 835.

[8] (1875) L.R. 7 H.L. 869.

For those reasons, therefore, I think that the claim that is made for return of the money as for a consideration which has wholly failed is bad in law and on the facts, and cannot succeed, and the claim with which I therefore have to deal is a claim for damages for breach of a contract.

Mr. Roskill argued that the buyer had, by his election, not merely waived the breach of condition, but that he had also waived the breach, meaning thereby that by taking up the goods when they were taken off the ship in December and by his subsequent conduct he had abandoned the right to claim any damages. But that argument, with respect, seems to me to be quite unsound. The only way of establishing it would be to show a separate agreement, binding on the buyer, by which he had agreed to surrender the right to damages which automatically vested in him at the time of the breach. The authority to which I was referred in support of that was some dicta of Branson J. in *Hain Steamship Co. Ld.* v. *Tate & Lyle Ld.*[10] which did not seem to me to do anything more than set out the well-known principle that a man must elect between the choice of treating a condition as giving him a right to rescind, or turning it into a warranty giving him a right to damages. Thus, I think that the question which is left for me to determine in the present case is what is the true measure of damage.

That question gives rise to some difficulties in law. Prima facie a fall in the market value is not a matter for which a buyer whose contract has been broken can recover damages; a fall in market value does not flow from anything which the seller has done. Therefore Mr. Roskill submits that the true measure of damage in this case is simply the difference in the market value between a November and an October shipment. The seller shipped four days late, with the result that the buyer had a November shipment instead of an October shipment. The fact that all sorts of shipments, October, November, January, February, March, April, had all fallen in value together, is wholly irrelevant. The question to be determined is whether a November shipment fell rather more than an October shipment, in which case the difference can be recovered as damages. That that is the ordinary measure of damage in the ordinary case of delayed shipment of goods is made plain by the authority of *Taylor & Sons Ld.* v. *Bank of Athens*,[11] and I do not think that I need do more than cite the essential sentence in the judgment of McCardie J., who said[12]: "It is vital to observe that the loss "must result from the breach of warranty, as distinguished from "a loss through having entered into the contract. It does not "extend, I think, to a case where the loss results not from the "breach of warranty but from an unfortunate or improvident "bargain which the buyer may have made. Market falls are not "generally due to a vendor's default. A buyer cannot, I think, "save perhaps in very exceptional circumstances, attribute to his "seller a loss which, in substance and in fact, arises not from "the seller's breach, but from a fall in market values. To "impose the burden of such a loss on the seller would be to "saddle him with something for which he is wholly free from "blame."

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[9] [1923] 2 K.B. 500.

[10] (1934) 39 Com.Cas. 259; 50 T.L.R. 415.

That case was distinguished in *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*,[13] where the facts were substantially the same, except that the buyer, instead of suing for damages for failure to ship within the contract time, sued, as he was able to do in that case, for damages for failure to deliver a correct bill of lading. There was no fraud found, but the shippers had persuaded the shipowner to put an incorrect date on the bill of lading, as a result of which the documents had been accepted, whereas otherwise they would not have been. The buyer therefore sued for a breach of that term of the contract, and it is generally accepted, and accepted specifically by Mr. Roskill in the present case, that it is an implied term of a contract of this kind that one must tender a correct bill of lading. Wright J.[14] held that the true measure of damages for a breach of that term was damages for the loss of the right to reject, and the Court of Appeal affirmed his decision. The injury which the breach had worked upon the buyer was that it deprived him of the right to reject, a right which he would have exercised if the bill of lading had been truly dated, and that he must therefore be put in the same position as he would have been in if he had had that right to reject. Of course, if the market has fallen, a buyer will, if he is considering only economic conditions, exercise his right to reject, because he can then go out into the market and buy the same goods at the market price, which ex hypothesi, is lower than the contract price, and he can put the difference in his pocket; and so the Court of Appeal held that in that case the true measure of damage was the difference between the contract price and the market price at the time of delivery.

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[11] (1922) 27 Com.Cas. 142.

[12] Ibid. 147.

[13] [1929] 1 K.B. 400; 45 T.L.R. 149.

Which is the right measure to apply in the present case? Prima facie the measure that is laid down in *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*,[15] since this is a case of an incorrect bill of lading. But Mr. Roskill argues that the *Kwik Hoo Tong* case[15] can be distinguished, the main distinction upon the facts of the case being that in that case the buyer did not discover the true facts until after he had taken delivery of the goods at the port of destination and had resold them. By that time he had lost any right which he might have had to reject the goods themselves on their arrival at the port of destination. In the present case Mr. Roskill says that that is not so. Before the goods were landed, and before he was required to do any act in relation to them at all, a partner in the Zung Fu Co., Sulke, was aware that the shipment had been made on the wrong date, and that the bills of lading were incorrectly dated, and accordingly, his loss of the right to reject flowed from his own act in accepting the goods. He could, then, have simply said: "I am not going to take the "goods," and he could have rejected them there and then. His loss of the right to reject was not, as it were, permanently lost, but, matters not having proceeded so far as in the *Kwik Hoo Tong* case,[15] he still had his rights open to him, and he could have rejected the goods. That loss, it is argued, cannot, therefore, be attributed to the incorrectness of the documents, because it was known to him in time to enable him to reject the goods had he wished to do so.

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[14] [1928] 2 K.B. 604.

[15] [1929] 1 K.B. 400.

There may be some question on the facts about that. I believe that Sulke did know that the goods had not been shipped until November 1, and it may very well be that he ought to have known, and perhaps the right view is that he ought to have known that the bill of lading date could not be the correct date. He could, of course, have ascertained from the ship herself quite definitely, had there been any doubt about it, that she had not called at Antwerp until November 1, and certainly he could have ascertained that fact from the defendants' solicitors. But I have come to the conclusion that upon broader grounds, whether or not Sulke had sufficient knowledge upon which to act—and it is said on the other side that he ought to have had more time to make up his mind—the distinction is not a sound one because it rests upon a fallacy, if I may so put it, or upon an incorrect way of looking at the matter, which treats it as if there was only one right to reject the same thing, a right to reject which arose when the documents were tendered, and which was not finally disposed of until the goods were handled and delivery taken, and which therefore could have been rescued, as it was, before the final act had taken place.

I do not think that that is the right view of the matter. There is not, in my judgment, one right to reject; there are two rights to reject. A right to reject is, after all, only a particular form of a right to rescind the contract. Wherever there is a breach of condition there is a right to rescind the contract, and if there are successive breaches of different conditions committed one after the other, each time there is a breach there is a right to rescind in respect of that breach. A right to reject is merely a particular form of the right to rescind, which involves the rejection of a tender of goods or of documents; and a rightful rejection of either is a rescission which brings the contract to an end.

Here, therefore, there is a right to reject documents, and a right to reject goods, and the two things are quite distinct. A c.i.f. contract puts a number of obligations upon the seller, some of which are in relation to the goods and some of which are in relation to the documents. So far as the goods are concerned, he must put on board at the port of shipment goods in conformity with the contract description, but he must also send forward documents, and those documents must comply with the contract. If he commits a breach the breaches may in one sense overlap, in that they flow from the same act. If there is a late shipment, as there was in this case, the date of the shipment being part of the description of the goods, the seller has not put on board goods which conform to the contract description, and therefore he has broken that obligation. He has also made it impossible to send forward a bill of lading which at once conforms with the contract and states accurately the date of shipment. Thus the same act can cause two breaches of two independent obligations.

However that may be, they are distinct obligations, and the right to reject the documents arises when the documents are tendered, and the right to reject the goods arises when they are landed and when after examination they are found not to be in conformity with the contract. There are many cases, of course, where the documents are accepted but the goods are subsequently rejected. It may be that if the actual date of shipment is not in conformity with the contract, and the error appears from the documents, the buyer, by accepting the documents, not only loses his right to reject the documents, but also his right to reject the goods, but that would be because he had waived in advance reliance on the date of shipment.

That they are distinct obligations, and that that is the root of the reasoning in the *Kwik Hoo Tong* case,[16] is to my mind apparent from the way in which the case is put in the judgment of Greer L.J., who said[17]: "The respondents say "that the appellants not merely promised to ship the sugar "in September but by a distinct and separate promise under-"took to hand a bill of lading which would truly state that "the sugar was shipped in September; so their claim is not "merely for damages for breach of contract to deliver the sugar "to the ship in September but for damages for the breach of the "undertaking to give a true bill of lading. It seems to me that "that is the answer to Mr. Jowitt's vigorous argument that the "two things to be compared are the position the respondents "would be in, so far as money is concerned, if the whole agree-"ment had been performed on the one hand, and the position "they would be in if the whole agreement was not performed. "What has to be considered is the plaintiff's position as regards "money if the particular term of the agreement had been per-"formed, and they are to be put, so far as money is concerned, "in that same position by damages for breach of that term of "the contract. The judge has taken the view that the shippers "promised to state truly in the bill of lading the date of ship-"ment, and the respondents say that if that had been done they "would have been entitled to reject the goods. By the breach

[16] [1929] 1 K.B. 400.

[17] Ibid. 413.

"of contract in sending forward a bill of lading containing a "false statement, the plaintiffs say they have been deprived of "that right. I suggested to the appellants that if their promise "to tender a correctly dated bill of lading had been in a separate "contract their contention would have been unarguable. It "seems to me to make no difference that the term is in the same "contract which contains the obligation to ship the sugar in "September."

He continued in a further passage[18]: "I agree with Mr. "Jowitt that the result of that is to give the plaintiffs in this "case exactly the same damages as they would have received "if they had successfully brought an action for fraudulent "misrepresentation, but there may well be terms in a contract "which, if broken, put the party complaining of the breach in "the same position as if he claimed damages for false misrepresentation. That is the view that commends itself to my "mind. . . ." There being, therefore, two separate and distinct obligations, there is a right to rescind arising on the breach of any one of them, and the matter has to be looked at in the way that Greer L.J. suggested, as if the two obligations were contained in two separate contracts.

It follows, therefore, as a matter of principle, that the action of the plaintiff on the second breach cannot affect his right to damages on the first breach. They are distinct not merely in law, but also as a matter of business. Having a right to reject the documents separately from a right to reject the goods, it is obvious that as a matter of business very different considerations will govern the buyer's mind as he applies himself to one or other of those questions. When he has to make up his mind whether he accepts the documents, he has not parted with any money. If he parts with his money and then has to consider whether to reject the goods, wholly different considerations would operate. In the interval he may have had dealings with the goods; he may have pledged them to his bank, he may have agreed to resell the specific goods, and the position may have been entirely altered.

Let me leave aside the position of a bank and take the simple case of a buyer who has not dealt with the property in any way, but has accepted the documents believing them to be accurate; and suppose that when the goods arrive the market has fallen by, say, five per cent. The buyer is faced with the choice, if he rejects the goods and wants to put himself back into the same position, of having to go out into the market and buy a new lot of goods at 95 per cent. of the purchase price. He might well feel, if the seller to him was somebody about whom he knew little, that he was not going to part with the goods by rejecting them and pay out another 95 per cent. of the price (which he might pay to the seller himself if the seller was selling the goods in the market, the property having returned to him) and be faced merely with an unsecured claim for the recovery back from the seller of the price which he originally paid. Very different considerations would naturally govern his mind at that stage, when he was considering whether to reject the goods or not, from those which would govern his mind when he was considering whether to reject the documents.

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[18] [1929] 1 K.B. 400, 414.

If I might call the breach of the term to deliver correct documents breach A, and the failure to ship goods on the contract date as breach B, it seems to me that the right to damages for breach A vests when the breach is committed, that the measure is then determined as being the proper measure required to put the buyer in as good a position as he would have been in if the breach had not been committed; and that when a separate breach, breach B, is committed the buyer has a separate and independent right to elect upon that breach as to the way in which he is going to deal with it, whether he treats it as a condition or as a warranty, and that he cannot be fettered in the exercise of that right as he would be if by his election he altered the measure of damage for breach A. That measure of damage must remain the same however the buyer elects to deal with breach B.

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In my judgment, therefore, the only way in which Mr. Roskill could properly put his case, once one accepts the view that there are two breaches with two separate rights to reject or rescind which can be separately and independently exercised, is to say that in some way the buyer was pledged to minimize his damage under breach A by taking a certain course of action under breach B by rejecting the goods. I do not think that he did put it in that way, nor do I think that it would be a successful way of putting it. In fact, if he had rejected the goods it would not have been to the advantage of the seller in any way nor would it have minimized the damages. The damages would have been just the same except that the seller would, no doubt, have had the convenience of handling the goods instead of the buyer. For these reasons, therefore, I think that the defendant's distinction of the principle in *Kwik Hoo Tong*[19] is a bad distinction and so far as that is concerned the principle applies.

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[19] [1929] 1 K.B. 400.

Before I leave the *Kwik Hoo Tong* case,[19] it is worth referring to the passage I read in Greer L.J.'s judgment where he equated the damages for this type of breach to damages for fraud. Mr. Roskill concedes that if fraud had been proved in the present case the damages would be the same as if *Kwik Hoo Tong*[19] applies. It seems to me that, from the view taken of the facts of that case in the Court of Appeal and from what Wright J. said in the court below, one of the factors to which the court drew attention was the importance of ensuring that behaviour of this sort in relation to shipping documents was not allowed to pass with impunity. Those are observations of the court; they did not affect the legal principle, but I say merely by way of observation that, if Mr. Roskill's argument is right, the defendants would escape with nominal damages, and when they brought their action against the third parties, who undoubtedly, on the view which I have taken of the facts, have committed fraud, they would either have to claim against them the full measure of the fraud and make a profit, or alternatively, they would ask only for an indemnity for nominal damages to compensate them for their liability to the plaintiffs, in which case the third party would escape with impunity from the consequences of the fraud which has been committed.

There is one other matter on this aspect of the case with which I should also deal, although it arises only indirectly. In view of the conclusion at which I have arrived that I am dealing with two separate breaches, each with their separate remedies, it is not relevant to consider whether the buyers lost their right to reject the goods. In my view they lost their right to reject the documents, and their right to reject the goods was something different which they could exercise one way or the other whichever way they chose. If there had been only one right to reject it would have been material to ascertain whether the buyers had in any event lost their right to reject by any action taken by them in relation to the documents. Had they handled the documents in such a way as to amount to an acceptance under section 35 of the Sale of Goods Act, 1893, and if they had committed that act before they had knowledge of the true position, then Mr. Roskill would have been faced with the argument that when the goods were landed the buyers were in any event obliged to accept them, having already lost their right to reject them, so that no distinction could properly be drawn between that and the *Kwik Hoo Tong* case.[19]

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[19] [1929] 1 K.B. 400.

One of the matters which was therefore canvassed in the course of the argument was whether the buyers, by pledging the documents to their bank as they did immediately upon receipt of them, had not in any event dealt with the goods in such a way as to amount to an acceptance under section 35 and had thereby lost their right to reject. On the view which I have taken, this point no longer arises. What I have to say about it is, therefore, merely obiter dictum, but in view of the fact that it is a matter of some importance and that I have had considerable assistance from the researches of Mr. Roskill and Mr. Honeyman on the point, I think it desirable that I should state, if only so that those who may be concerned in the future may know that the problem arises and has to be solved, what I think is the right answer to it. Clearly, it would create a great deal of embarrassment and inconvenience in the ordinary forms of credit in these transactions if the normal act of pledging goods to the bank, which is done in ninety-nine cases out of a hundred, resulted in the buyer losing his right to reject. Yet, on the face of it, it seems that by pledging the goods he is doing an act, inconsistent with the ownership of the seller, which amounts to an acceptance under section 35.

The only authority which Mr. Roskill and Mr. Honeyman could find on the point is a note in Halsbury's Laws of England, Hailsham ed., vol. 29, p. 224, para. 297. That article was contributed by Scott L.J. and Mr. Diplock, and Mr. Roskill has verified that this particular note was not in the earlier edition. I think that it is fairly safe to say, therefore, that it strictly represents Scott L.J.'s view of the matter and has that very considerable degree of authority. In the text it is stated: "The "right to reject is lost by unreasonable delay in rejecting, or "by the buyer doing an act in relation to the goods inconsistent "with the ownership of the seller. Resale of the goods before "inspection, e.g., by transfer of the bill of lading to a third "party is such an act, but it would seem that a mere pledge of "the documents of title would not be such an act." The note below is, "In most 'c.i.f.' contracts when the shipping docu-"ments are taken up by a banker on the buyer's behalf there "is a pledge of such documents by the buyer to the banker, "so that if pledging the documents of title put an end to the "right of rejection, there would never be a right of rejection "in many 'c.i.f.' contracts. The point has never been taken "in any decided case, but it is submitted that the statement in "the text is not inconsistent with *Hardy & Co. (London) Ld.*

"v. *Hillerns and Fowler*,[20] and is in accordance with mercantile "usage which is preserved by section 35 of the Act." The words of section 35 which have to be considered are "The buyer is "deemed to have accepted the goods when he intimates to the "seller that he has accepted them, or when the goods have been "delivered to him, and he does any act in relation to them "which is inconsistent with the ownership of the seller, or "when after the lapse of a reasonable time, he retains the goods "without intimating to the seller that he has rejected them."

In *Hardy & Co. (London) Ld.* v. *Hillerns and Fowler* [20] the question which arose for decision was whether the buyers had accepted the goods under section 35. The goods had arrived, and the case showed that the time during which he had the right to examine them was still running. During that time the buyer delivered some of the goods to a sub-buyer. That was an act which was inconsistent with the ownership of the seller. The case for the buyer was that section 35 was machinery which came into action only after the machinery in section 34 had been completed. The Court of Appeal held otherwise. The court held that, notwithstanding that his time for examination was still open, the buyer could, if he chose to commit an act under section 35 such as intimating that he accepted the goods, accept them.

Mr. Roskill has argued that when the goods are delivered to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller the word "delivered" there means physical delivery of the goods from the ship. If that is so, no dealing with the documents would be within the meaning of the clause, because it would all have been done before the goods had been delivered. I cannot take that view of it. "Delivery" as defined by the Act means a voluntary transfer of possession, and I think that it means, therefore, transfer of possession under the contract of sale. In a c.i.f. contract the goods are delivered, so far as they are physically delivered, when they are put on board a ship at the port of shipment. The documents are delivered when they are tendered. A buyer who takes delivery from the ship at the port of destination is not taking delivery of the goods under the contract of sale, but merely taking delivery out of his own warehouse, as it were, by the presentation of the document of title to the goods, the master of the ship having been his bailee ever since he became entitled to the bill of lading.

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[20] [1923] 2 K.B. 490; 39 T.L.R. 547.

I think that the true answer may be found rather differently. Atkin L.J., in the course of his judgment in *Hardy & Co. (London) Ld.* v. *Hillerns and Fowler*,[20] dealt with the situation which is always a little puzzling under the c.i.f. contract: if the property passes when the documents are handed over, by what legal machinery does the buyer retain a right, as he undoubtedly does, to examine the goods when they arrive, and to reject them if they are not in conformity with the contract? Atkin L.J. put forward two views for consideration. One was that the property in the goods, notwithstanding the tendering of the documents, did not pass until the goods had been examined or until an opportunity for examination had been given. The other was that it passed at the time of the tendering of the documents, but only conditionally and could be revested if the buyer properly rejected the goods. Mr. Roskill argues (and I think rightly) that for the first possible view indicated by Atkin L.J. no other authority can be found, and it would clearly create considerable complications. If there is no property in the goods, how can the buyer pledge them? It would provide a simple answer to the point had it arisen in this case, since there could not be a pledge. I think that the true view is that what the buyer obtains, when the title under the documents is given to him, is the property in the goods, subject to the condition that they revest if upon examination he finds them to be not in accordance with the contract. That means that he gets only conditional property in the goods, the condition being a condition subsequent. All his dealings with the documents are dealings only with that conditional property in the goods. It follows, therefore, that there can be no dealing which is inconsistent with the seller's ownership unless he deals with something more than the conditional property. If the property passes altogether, not being subject to any condition, there is no ownership left in the seller with which any inconsistent act under section 35 could be committed. If the property passes conditionally the only ownership left in the seller is the reversionary interest in the property in the event of the condition subsequent operating to restore it to him. It is that reversionary interest with which the buyer must not, save with the penalty of accepting the goods, commit an inconsistent act. So long as he is merely dealing with the documents he is not purporting to do anything more than pledge the conditional property which he has.

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[20] [1923] 2 K.B. 490.

Similarly, if he sells the documents of title he sells the conditional property. But if, as was done in *Hardy & Co. (London) Ld.* v. *Hillerns and Fowler*,[20] when the goods have been landed, he physically deals with the goods and delivers them to his sub-buyer, he is doing an act which is inconsistent with the seller's reversionary interest. The seller's reversionary interest entitles him, immediately upon the operation of the condition subsequent, that is, as soon as opportunity for examination has been given, to have the goods physically returned to him in the place where the examination has taken place without their being dispatched to third parties. The dispatch to a third party is an act, therefore, which interferes with the reversionary interest. A pledge or a transfer of documents such as that which takes place on the ordinary string contract does not.

I observe that the view expressed in Halsbury's Laws of England, Hailsham, ed., vol. 29, p. 224, para. 297, seems to be that the transfer of the bill of lading to a third party would be inconsistent with section 35. I myself should prefer to take the view that neither of them is inconsistent for the reasons I have given; they stand on the same level and they are both dealing merely with conditional property. It would in my view be unsatisfactory if a court had to decide every time where there was a string of contracts that as soon as the documents had been passed to the first in the string with the intention to pass title in the property the right to reject was thereby lost.

It might further be suggested that in any event, in the circumstances of this case, the buyer having pledged the goods to a banker was not in a position to reject, because it was his banker who exercised dominion over them by reason of the pledge. That, again, raises a question of some theoretical difficulty: can a buyer in effect defeat a pledge by exercising his right of rejection? One view might be that although the property is conditional property which is subject to a condition subsequent, he cannot by his own voluntary act in putting the condition subsequent into operation defeat the pledge. The other view would be that it cannot have been contemplated as between banker and seller that when the buyer pledged the documents he was intending to abandon or impair his right of rejection. It would certainly be very far from the circumstances of the present case in the course the argument has taken that I should express any view on that. It is merely a matter to which attention might be paid by those who are concerned with it. Obviously, the banker, in drafting his letter of credit or his instructions, can impose what condition he likes, and it may be that in those matters prevention is better than cure, at any rate, if the cure involves litigation.

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[20] [1923] 2 K.B. 490.

That leaves me with only one further point. The plaintiffs will recover damages assessed on the measure which I have indicated. But there is an additional claim for damages made by the plaintiffs for a sum of about £1,200 on the basis that they had lost the profit under the Nam Hua contract which they would have made if the contract had gone through. The ground for the claim is that the plaintiffs were known to be merchants. It was known, therefore, and must have been contemplated, that they had bought the goods for re-sale, that they re-sold the same October shipped goods to Nam Hua and, accordingly, that when the goods were delivered in breach of contract by not being shipped on the right date they were prevented from delivering them to Nam Hua and earning their profit. Those specific goods, shipped on the *Tarn* by the defendants, not having been delivered, the plaintiffs say that they could not go out into the market, which admittedly had fallen, and buy goods to satisfy Nam Hua's contract, because they had re-sold those very goods.

loss of profit b
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I do not think that that claim can succeed, first, because there is no evidence that that measure of damage was contemplated by the parties. It is perfectly true that the defendants knew that the plaintiffs were merchants who had bought for re-sale, but everybody who sells to a merchant knows that he has bought for re-sale, and it does not, as I understand it, make any difference to the ordinary measure of damage where there is a market. What is contemplated is that the merchant buys for re-sale, but if the goods are not delivered to him he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has suffered no damage; if the market has risen the measure of damage is the difference in the market price. There are, of course, cases where that prima facie measure of damage is not applicable because something different is contemplated. If, for example, a man sells goods of special manufacture and it is known that they are to be re-sold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the appropriate measure of damage. Similarly, it may very well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for re-sale generally, but upon a string contract

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where he will re-sell those specific goods and where he could only honour his contract by delivering those goods and no others, the measure of loss of profit on re-sale is the right measure.

In my judgment there is no evidence that the defendants had any knowledge that the plaintiffs intended to re-sell those very goods; indeed, I am not at all sure that the plaintiffs did intend to re-sell those very goods. I think that the highest that the case can be put is that the plaintiffs, if they did anything at all, appropriated those goods subsequently to the contract with Nam Hua. But there is no evidence that there was any system of string contracts; or that the defendants knew anything more than that the plaintiffs were buying for re-sale generally, and no evidence to show that it could ever have been contemplated that if the goods were not delivered it would be necessary for the plaintiffs to do anything except go out into the market and buy similar goods which would have taken their place.

I can deal shortly with the second answer. The contract between the plaintiffs and Nam Hua is a curious document, but I do not think that Mr. Ashe Lincoln argued that it was a contract for the re-sale of specific goods. He said, in effect, that when he obtained the extension of time he made an arrangement with Nam Hua by which he agreed to supply October shipment on the *Tarn*, and he had to honour it with that particular shipment. I do not think that the documents show that he made any such arrangement. To get an extension of the date he naturally had to give some information to Nam Hua about what he was going to do to honour his contract. Therefore, he told them that the goods were coming on the *Tarn* and were to be shipped on October 31. I do not think that he ever tied himself down to those goods. He could, therefore, have fulfilled his contract with Nam Hua by going out into the market and buying other goods. It is said that had he done so he would have been doing something commercially not very honest, which is the other principle which was considered in *James Finlay & Co. Ld.* v. *Kwik Hoo Tong H.M.*[21] I do not take that view. I can understand that having obtained a concession from Nam Hua, Sulke, on behalf of the plaintiffs, would have been reluctant, after having been well treated by Nam Hua, to force goods on them on a falling market which were not the goods which it was generally understood that Nam Hua was to have; but I do not think that that really brings the second principle in *Kwik Hoo*

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[21] [1929] 1 K.B. 400.

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Tong[21] into play. For those reasons, therefore, I cannot allow that element of damage. There will be judgment for the plaintiffs.

July 26. *F. Ashe Lincoln Q.C.* and *George J. Webber* for the plaintiffs. The measure of damage is the difference between the price of the goods and the fair market value of the goods at the date of delivery: *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*,[1] *per* Sankey L.J.[2] Applying that principle to the facts of the present case, the date on which the damages should be assessed is the date on which the goods were delivered, or, alternatively, the date on which the plaintiffs first became aware that they had a right to reject. For all practical purposes there would be no difference in the present case in the market value of the goods whichever date is taken. Assuming that that is the right principle to apply in assessing damages, it is submitted that the market price to be considered is that prevailing in the market at the place of delivery, namely, the Hongkong market, and not world prices or the world market.

The evidence shows that although nominal prices were quoted for this type of goods in the daily commodity price lists, those prices were expressed to be nominal; and the evidence also shows that there was no real market in the sense that there were no real buyers for this class of goods at the time of delivery since the imposition by the Chinese of an embargo on the importation of such goods from Hongkong had resulted in the disappearance of the market. Therefore the goods had only a salvage value. [Reference was made to *Lesters Leather and Skin Co. Ld.* v. *Home and Overseas Brokers Ld.*[3]]

Eustace Roskill Q.C. and *George Honeyman* for the defendants. The plaintiffs had a right to reject the documents at the time when the forgery of the bills of lading took place or, at the latest, when the documents, including the forged bills of lading, were tendered to the bank for payment. Although the fact that a right of rejection existed was not known to the plaintiffs, nevertheless a right to reject as such then existed. Upon that basis it is submitted that the date for calculation of damages should be November 10, 1951, on which date there was a real market. A breach vests at the date when it is committed. If December 17, the date of delivery, is to be taken as the date for the calculation of the damages, then at that date a market did exist in other parts of the world and that fact should be taken into account. This was a breach by the seller, and the market value of goods is to be assessed as the price at which a willing buyer could buy. The nominal quotations in the commodity price lists were clearly the prices at which a buyer could buy. [Reference was made to *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*,[4] *The Arpad*[5] and *Marshall & Co.* v. *Nicholl & Son.*[6]]

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[21] [1929] 1 K.B. 400.

[1] [1929] 1 K.B. 400; 45 T.L.R. 149.

[2] [1929] 1 K.B. 400, 416.

[3] (1948) 64 T.L.R. 569.

Michael Kerr for the third party.

DEVLIN J. I now have to assess the damages which flow from the breach of contract which I have found in this case to have been committed, that is, the delivery by the sellers to the buyers of forged bills of lading, with the result that the buyers, who accepted them, lost the right to reject which they could have exercised had they known, as they ought to have known from the bills of lading, the true date of shipment.

The principle upon which the damages fall to be assessed I have also already considered, and I have held that the damages are to be determined in accordance with the decision of the Court of Appeal in *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*[1] The facts in that case were very similar to those in the present case, but the dates are important. In *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*[1] the ship arrived with the goods on board before the documents were tendered; the date of its arrival being November 9, 1920. The documents were tendered on November 12, and the ship completed her discharge on November 15. The goods were rejected by the purchasers, were sold by auction in December 1920, and it was not until some considerable time later, in 1922, that the buyer discovered that the bill of lading was false, and brought his action for damages. The measure of damage was held to be the difference between the contract price of the goods and the market price, as evidenced by the price obtained at the auction.

The dates referred to are to be found in the report of the case in Lloyd's List Reports,[2] and that report makes it clear that the market price did not fluctuate between the date of tender, November 12, and the date when the goods were sold, December 10. It had, however, fallen considerably below the contract price, and the buyer was thus enabled to obtain by way of damages compensation for the fall in the market. That followed because,

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[4] [1929] 1 K.B. 400; 31 Ll.L.Rep. 220.

[5] [1934] P. 189; 50 T.L.R. 505.

[6] 1919 S.C. 244.

[1] [1929] 1 K.B. 400; 45 T.L.R 149; 31 Ll.L.Rep. 220.

[2] 31 Ll.L.Rep. 223.

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had he exercised his right to reject, he would have been able to do so, and by so doing would in effect have relieved himself of the result of the fall in the market.

The basis upon which that conclusion was reached is stated by Wright J. in the court of first instance.[3] Having explained the measure of damage, he said[4]: "The measure of damages "in such a case, in my judgment, is that which I have explained, "and it seems to me exactly to fall within the language of "section 53, subsection (2), of the Sale of Goods Act, 1893— "namely, 'the estimated loss directly and naturally resulting, "'in the ordinary course of events, from the breach of "'warranty.'"

Applying that measure, I should not have thought that there would be any difficulty in principle on the facts in this case. The dates and figures in the present case are that the contract price was £590 per ton, the documents were tendered while the voyage was still continuing, on November 10, 1951, and by that date the price had fallen. It is common ground that the reason why the price fell was because of an embargo placed by the Chinese authorities upon the importation of goods of this type from Hongkong. That embargo, in the words of one of the witnesses, "knocked the market to pieces." One of the matters which I shall have to consider is whether there was really a market at all, but there were, at any rate, quotations, although they are said to be, and many of them are in fact given as, "nominal" quotations. The nominal quotation on November 10 was 3·65 cents per lb., which worked out at the equivalent of £504 sterling per ton, so that by that date the market price had, upon any view, fallen to some extent. By December 17, the date when the goods arrived, the quotations had fallen still further, and the comparable figure in sterling per ton was £330.

I have already in my earlier judgment[5] dealt with the date upon which the plaintiffs knew or ought to have known that they had a right to reject, and it is unnecessary for me now to say more than that for the purpose of this judgment I can take it as being not later than December 17, 1952. This is not, therefore, a case like the *Kwik Hoo Tong* case,[6] in which that knowledge was not acquired until some time afterwards. The date when delivery was taken from the ship was a date on which the plaintiffs knew a great deal, and it is sufficient for the purpose of the judgment in this case to say that they knew enough to enable them to reject, because the case for the plaintiffs is that on or before December 17 and until the present day the goods were substantially worthless, so that the exact date does not matter. In those circumstances a difficulty may arise in attempting to find the value of the goods at the relevant time, but it does not appear to me that there is any real difficulty in principle in a case of this sort. So far as the principle is concerned, the buyer is, upon the measure as set out by Wright J., entitled to be put in the same position as he would have been in if he had exercised his right to reject. He has the goods, he has parted with his money, and therefore he wants to relieve himself of the goods and recover his money. If that is done he will be in the same position as he would have been in if he had never parted with his money and had never received the goods. Accordingly, the reasonable course for him is, as soon as he ascertains that he has a right to compensation, in that the bills of lading were false, to sell the goods then, or within a reasonable time thereafter, for what they will fetch, and to obtain from the seller the difference between the price obtained for the goods and the contract price which he pays. In that way he will be put in almost precisely the same position as if he had rejected the goods. In other words, the measure is the difference between the contract price and the price at which the buyer has sold the goods. Whether that is put as the price which the buyer actually gets for the goods, or whether it is put as the market price obtainable for the goods on the day when the buyer should sell them, I do not think matters very much. It is put in both ways in the course of the judgment in the Court of Appeal in *James Finlay & Co. Ld.* v. *N. V. Kwik Hoo Tong H.M.*,[7] but if one bears in mind the principle that the buyer is bound to mitigate his damage, then as soon as he knows of his rights he must sell the goods. He cannot do so before he does know his rights, and "as soon as" means within a reasonable time thereafter. If he chooses not to sell the goods he is not to be put in any better or worse position by delaying for his own purposes, so that, in substance, it is the price which he actually gets on selling them, or the price which he actually could get if he did sell them.

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[3] [1928] 2 K.B. 604; 44 T.L.R. 643.

[4] [1928] 2 K.B. 604, 613.

[5] Ante, pp. 472–3.

[6] [1929] 1 K.B. 400.

Upon that principle, the only difficulty which arises is due to the fact that upon the plaintiffs' case the buyer could not have sold the goods at any time on or after December 17, 1951, in the Hongkong market, that is to say, at any time after he knew of his rights to compensation. Before I deal with that, which is a difficulty arising purely upon the facts of this case, I must deal with the objection which Mr. Roskill has advanced to the principle as I have just stated it. Mr. Roskill submits that the true measure of damage is the difference between the contract price and the price at which the buyer could have bought corresponding goods in the market on November 10, 1951, that being the date when the documents were tendered, and when, therefore, his right to reject the goods arose.

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[7] [1929] 1 K.B. 400.

Mr. Roskill concedes, of course, that that was not the date taken in *James Finlay & Co.* v. *Kwik Hoo Tong*,[7] the principle of which case I am applying, but he has pointed out that in that case the market price at the date of tender was the same as the market price at the time of the auction, and therefore there was, as he puts it, tersely, "no money in the point." It is quite clear that it never occurred to anybody to take the date of tender as being the relevant date. It is clear also from the terms of Wright J.'s judgment,[8] that he was not taking the date of tender. There is nothing to show that he considered the date of tender as being in any way relevant, but, as Mr. Roskill says, there being nothing in the point, it was not argued, and it is open to him now.

In my judgment, his argument is fallacious in two respects, first, because I do not think that November 10, 1951, was the relevant date, and secondly, because it takes the buying price instead of the selling price. With regard to the first point, the breach for which damage is being awarded is, in effect, the breach of the duty imposed by the contract to give, by means of the bills of lading, correct information about the date of shipment. The bills of lading were false, although the defendants themselves were not privy to the fraud, but they were, by those who perpetrated the fraud, intended to be acted upon and to deceive, among others, the plaintiffs, and the plaintiffs were so deceived. It seems to me to be quite illogical to say that the plaintiffs must be expected as reasonable men to act in the same way as if they had not been deceived.

As to the consequences of a wrong which deceives the aggrieved party, whether it be a tort or a breach of contract, the aggrieved party cannot be expected to act in such a manner as to compensate himself until he has ascertained the fact. It seems to me quite fictitious to talk of the buyers having to be treated as if they had gone out into the market and bought goods on

[7] [1929] 1 K.B. 400.

[8] 31 Ll.L.Rep. 220, 223.

November 10, when, in fact, they had supposed that they had already taken up goods which were in accordance with the contract, and they had no notion, and could have had no notion, that they had any rights with regard to the contract. Mr. Roskill has, I will not say "based" his argument, but fortified it by reference to a passage in the judgment which I have already delivered in this case,[9] which he says leads to the conclusion which he has advanced, but I do not know that it would matter very much if that passage did lead to the conclusion which he advanced, because a dictum of a judge of first instance is not binding even upon himself; but in fact I do not think it does lead to that conclusion, and I do not think that it is necessary for me to alter in any way the view which I then expressed.

I said[10]: "If I might call the breach of the term to deliver "correct documents breach A, and the failure to ship goods on the "contract date as breach B, it seems to me that the right to "damages for breach A vests when the breach is committed, that "the measure is then determined as being the proper measure "required to put the buyer in as good a position as he would have "been in if the breach had not been committed; . . ."

That I still believe to be a correct statement of the law, but it does not state, and it does not require, that the amount is to be determined by reference to the conditions which existed on the day when the breach was committed. The right to damages then vests, the measure is then decided upon, as it were, in law; but it may well be that the amount cannot be ascertained until subsequent events have determined it. That must be so, of course, in every case of fraud, where the damages cannot be quantified until it is seen what means of mitigation are open to the aggrieved party when he knows the facts.

Mr. Roskill objects to the consideration of the question of fraud, because he says that the position is different in tort from what it would be in damages for breach of contract. I do not know that it is, but the matter is not peculiar to fraud. If one takes, for example, a case of wrongful dismissal, the right to damages vests on the date of the breach, which is the date of the wrongful dismissal. The measure of damages is then determined once and for all, and it is the difference between the salary or wages which the plaintiff would have earned under the contract for the remaining period of the contract, and such salary or wages as he has been able to get by obtaining comparable work during the period of the

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[9] Ante, p. 483.

[10] Ante, p. 483.

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contract which he did not serve with his former employer. The amount is still unsettled; it cannot be ascertained until it is seen what alternative remuneration the plaintiff is able to secure, and it would add nothing to the point to say that upon the date of the breach there happened to be a job vacant which was precisely the same as the one from which the plaintiff had been dismissed, at precisely the same salary, if the plaintiff did not know about it and could not, by the exercise of reasonable diligence, have obtained it. I think, therefore, that the relevant date is not the date of breach, but the date when the plaintiffs could, acting with reasonable diligence, and after they knew of their rights, have resold the goods on the market and obtained the best price they could for them.

The second fallacy in Mr. Roskill's argument is that he takes the buying price and not the selling price. That is not generally a matter of importance. The margin between the two is not ordinarily great, but in this case it happens to be of considerable importance. It is common ground that the quotations represent the price at which anybody could buy Rongalite in Hongkong. It may be that the plaintiffs could have bought it for less, but it is disputed that the quotations represented the price a seller could necessarily obtain when the market was so constricted that there was no longer the ordinary small margin between the buying and selling price.

In my judgment, the buying price has nothing to do with the calculation which I have to make. It is no doubt true that if the goods had been rejected, the buyer, if he had wanted to provide himself with similar goods for the purpose of fulfilling his contract of resale, could have gone out in the market as on the day of the rejection and bought them, and the difference between the contract price and the lower buying price would have been the profit which he made by virtue of the rejection, and which in one sense he has lost because he did not reject. It is also true that if a buyer rejected and wanted to claim damages against the seller, the measure of damages, which could only arise at all if the market had risen and not fallen, would be the price at which he bought goods in order to put himself in the same position.

But those calculations, and the relevance of the buying price, depend upon the fact that the buyer has not got the goods. He has returned them, and is putting himself in the same position, so far as he can, as if the contract goods had been delivered. Therefore he has to buy. In this case the buyer has received the goods, and a calculation which supposes, incorrectly and notionally, that he should go out and buy another quantity of the same goods, has nothing to do with the reality of the matter. What he wishes to do in those circumstances, in order to put himself in the same position, is to sell the goods, not to buy them, and one would think, therefore, that the measure I have stated, and which seems to me to follow the principle to which I have referred, would be the right one.

Therefore, the only difficulty which arises is due to the fact that there cannot be fixed with any degree of certainty the price at which the buyer could have sold on the market on December 17 or thereafter. There is a substantial body of evidence to show that the quotations were merely nominal quotations, and many of them are indeed so described. There were some sales; there is no specific evidence of the quantity sold, but the general evidence is that they were all very small sales, and that in fact no substantial sales at all were taking place during the relevant period. That evidence comes from a number of sources, but I heard yesterday the evidence of Mr. Sulke, a partner in the plaintiff firm, who was dealing with the matter, and I have no hesitation in acting upon it. He seemed to me to be a good and reliable witness, and his evidence is corroborated and fortified by much other evidence given in the course of the case.

The conclusion which I draw from that evidence is that there was no market in which these goods could be sold, in the ordinary sense; that the market had gone to pieces, and that the only demand for this material being from the mainland, an enormous surplus was built up in the godowns in Hongkong, which nobody was willing to take, and the only outlet was small sales. The test of the matter, after all, is that Mr. Sulke has a quantity of this material on his hands, and I am satisfied that his evidence is true when he says that he has endeavoured to sell it, has failed so to do, and still cannot sell it. When I say that he has endeavoured to sell "it," that requires modification. He has not, or at any rate he did not for a considerable period after the event, endeavour to sell the 20 tons which were the subject-matter of the contract, because he supposed that they were not his property; but he had another 10 tons of a similar material, which he endeavoured but has been unable to sell. I am satisfied, therefore, that the plaintiffs' case is made out when they say that this commodity was virtually unsaleable in the Hongkong market. But "virtually unsaleable" does not mean that the goods have no value for the purpose of the calculation of damages. They have not yet been sold, and it is possible that they may never be sold, but it is also possible that trade may revive and that some sort of a market may be found for them if they are held on to long enough. They therefore have some value, although it may be a speculative one, but that possibility in itself is something which must be valued.

The only sale of any quantity which the evidence reveals is a sale at 50 cents per lb., that is, £70 per ton. The plaintiffs are content to take that as being evidence of the salvage value of the goods, and that is therefore the figure which, for the purpose of this calculation of value, I place upon them. The only other observation which I would make is that with regard to Mr. Roskill's contention that, there being no sellers' market in Hongkong, it was the duty of the plaintiffs in such circumstances to seek a market elsewhere. I need not say more about that than that I am not satisfied on the evidence that there was any market elsewhere in which the plaintiffs, acting reasonably, could have resold this quantity of these goods.

Accordingly, the damages will be calculated on the basis of the difference between the contract price of £590 per ton less the figure of £70 per ton, upon the contract quantity of 20 tons.

As to the third party's liability for costs, his Lordship said: I do not think that this is a case in which I should make any order other than an order for costs as between party and party.

Judgment for the plaintiffs for £10,400. No order as to costs. Judgment for defendants against third party. Third party to pay defendants' costs of action as between party and party and the costs of third party proceedings.

Solicitors: *A. Kramer & Co.; Constant & Constant; Middleton, Lewis & Co.*

END OF VOL. II AND OF QUEEN'S BENCH SERIES FOR 1954.

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LEGAL AID—*Costs—Means of aided person—Whether damages awarded to him to be taken into consideration—Payment into court of sum greater than that awarded—Plaintiff legally aided, nil contribution—Usual rule as to costs not affected by Legal Aid and Advice Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*e*), 4 (3).
Nolan *v.* C. & C. Marshall Ld. - **C.A. 42**

LICENSOR AND LICENSEE—*Requisitioned premises—Occupation by family by permission of requisitioning authority—Agreement made with plaintiff's husband—Injury to plaintiff owing to negligence of authority—Status of occupants—Duty owed—Licensees—Concealed danger—Knowledge by plaintiff of danger—Failure of authority to remedy it—Plaintiff not free to act on knowledge.*

Invitor and Invitee—Knowledge of invitee of danger. Emergency Legislation—Requisitioning.
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2. ——. See Revenue.

MARRIAGE—Breach of promise. See Husband and Wife.

METROPOLIS — *Fire* — *Precautions* — *Means of escape in case of fire—Failure to maintain means of escape in efficient working order—Employee of tenant injured in escaping from fire—Breach of statutory duty under London Building Acts (Amendment) Act,* 1939—*Whether owners and receiver liable—Whether receiver "owner"—Fire caused by short circuit—Defence of accident—Statutory duty—Statute imposing penalty for breach—Statute for benefit of particular class of persons—Whether person injured by breach has right of action—Fires Prevention (Metropolis) Act,* 1774 (14 *Geo.* 3, *c.* 78), *s.* 86—*London Building Acts (Amendment) Act,* 1905 (5 *Edw.* 7, *c. ccix*), *s.* 12—*London Building Act,* 1930 (20 *&* 21 *Geo.* 5, *c. clviii*), *s.* 5—*London Building Acts (Amendment) Act,* 1939 (2 *&* 3 *Geo.* 6, *c. xcvii*), *ss.* 33 (1), 35, 133 (2), 141 (3), 148.

Statutory duty—Whether civil right created—Penalty. "Owner."
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MORTGAGE—*Leaseholds—Mortgage by way of legal charge—Same remedies as mortgage by way of sub-demise—Lease forfeited for breach of covenant—User of premises for immoral purposes—Mortgagee's right to relief as underlessee — Assignment of lease of dwelling-house—Temporary occupation of basement by assignor—Whether tenant or licensee—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 87 (1) (2), 146 (4).

Landlord and Tenant—Licence or tenancy.
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Upjohn J. 160

MOTOR VEHICLE—Dangerous condition—Causation. See Road Traffic.

MURDER—Provocation. See Criminal Law.

NATIONAL HEALTH SERVICE — *Superannuation — Determination by Minister — Whether subject to review—Plaintiff's claim to be a mental health officer within the meaning of the regulations—Prior determination by Minister that plaintiff not a mental officer—"Any question arising under these "regulations . . . shall be determined by the "Minister"—Whether jurisdiction of court to determine plaintiff's claim ousted by regulations—Powers of the court—Powers of the Minister—National Health Service Act,* 1946

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(9 *&* 10 *Geo.* 6, *c.* 81), *s.* 67 (1)—*National Health Service* (*Superannuation*) *Regulations*, 1950 (*S.I.* 1950, *No.* 497), *reg.* 60.

Minister—Determination by—Whether subject to review by courts.

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2. —— *Onus of proof—Res ipsa loquitur—Operation under control of two persons—Hospital—Anaesthetist—Operations—Injection of spinal anaesthetic—Ampoule cracked—Contamination by phenol—Plaintiffs permanently paralysed — Liability of hospital for acts of specialist anaesthetist—Respondeat superior—Liability of anaesthetist.*

Hospital—Negligence. Vicarious Liability. Causation. Damages — Remoteness. Negligence—Duty of care.

Roe *v.* Minister of Health. Woolley *v.* Same - - - - - - - **C.A. 66**

3. —— Onus. See Shipping.

NUISANCE — Discharge of oil. See Shipping.

OBSCENE LIBEL. See Criminal Law.

PRACTICE—Pleading. See Shipping.

2. —— *Writ—Renewal—Order for renewal indorsed on affidavit prior to last day for renewal—Writ resealed after last day for renewal — Renewal effected by resealing — Indorsement on affidavit insufficient to keep writ alive—R.S.C., Ord.* 8, *r.* 1; *Ord.* 28, *r.* 11.

Duchin *v.* Swanage Urban District Council. Same *v.* Dorset County Council **Havers J. 308**

RATES AND RATING—*Lands Tribunal—Jurisdiction—Whether competent to entertain questions not the subject-matter of appeal or cross-appeal--Local Government Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 48 (3) (4), 49 (1)—*Lands Tribunal Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 42), *ss.* 1, 3—*Lands Tribunal Rules*, 1949 (*S.I.* 1949, *No.* 2263), *rr.* 9, 38 (4).

Ellerby *v.* March - - - **C.A. 357**

RES IPSA LOQUITUR. See Negligence—Onus.

REVENUE—*Customs and Excise—Limitation of action—Seizure of prohibited goods—Action for forfeiture and condemnation of goods—Whether "a suit for any offence "against the Customs Acts" — Action for penalty—Customs Consolidation Act*, 1876 (39 *&* 40 *Vict. c.* 36), *s.* 257—*Exchange Control Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 14), *ss.* 21, 34 *and Sch. V.*

REVENUE—*continued.*

Limitation of Action—" Suit for any offence " —" Forfeiture."

Commissioners of Customs and Excise *v.* Trustee of the Property of Sokolow (a Bankrupt) - - - - **Hilbery J. 336**

ROAD TRAFFIC—*Dangerous condition—User of motor vehicle in—Condition due to negligent repair by garage mechanics—Unwitting use on road by owner—Whether garage proprietor "caused" vehicle to be used on road in dangerous condition—" Causes or permits to " be used "—Motor Vehicles* (*Construction and Use*) *Regulations*, 1951 (*S.I.* 1951, *No.* 2101), *regs.* 72 (1), 101.

Causation. " Causes or permits."

Shave *v.* Rosner - - - **Divl.Ct. 113**

2. —— *Licence—Motor-vehicle—Licence for use for particular purpose—Use for purpose requiring higher duty—Penalty—Use not a criminal offence—Vehicles* (*Excise*) *Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *s.* 13 (2).

Brown *v.* Allweather Mechanical Grouting Co. Ld. - - - - **Divl.Ct. 443**

SALE OF GOODS—*C.i.f.—Date of shipment —Goods shipped late—Bill of lading date inaccurate—Goods retained by buyer after knowledge of late shipment—Sub-sale—Loss of profits—Contemplation of parties—Forged bill of lading—Date forged—Whether bill of lading a nullity—Loss of right to reject—Measure of damages—When goods " delivered "—Effect of pledge of goods—Effect of transfer under string contract—Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 35.

Shipping — Bill of lading. Damages. " Delivery." Contract—Fraud—Avoidance—Election to affirm—Lapse of time between discovery of fraud and avoidance. Fraud—Vicarious liability—Forgery by sellers' shipping agent.

Kwei Tek Chao *v.* British Traders and Shippers Ld. N. V. Handelsmaatschaappij J. Smits Import-Export, Third Party **Devlin J. 459**

2. ——. See Shipping.

SHIPPING—*Bill of lading—Loading—Hague Rules — Applicability — Goods delivered by sellers under f.o.b. contract — Contract of affreightment made by buyers—Damage to goods during loading due to negligence of shipowners—Goods not past ship's rail—Bill of lading not issued—No passing of property in goods — Whether damage occurred during " contract of carriage by sea " — Whether sellers party to contract of carriage—Exceptions—Whether available against action in tort — Shipowner entitled to limit liability — " Loaded on " — " Loading " — Carriage of Goods by Sea Act*, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *s.* 1, *Sch. arts.* 1 (*b*) *and* (*e*), 2, 3, 4 (5).

SHIPPING—*continued.*

Sale of Goods—F.O.B. Contract—Parties—Enforcement by third party. Bailment—Bald bailment. Statute — Construction — International convention — Statute based on — Ambiguity in statute—Relevance of original text of convention.

PYRENE CO. LD. *v.* SCINDIA NAVIGATION CO. LD. - - - - - **Devlin J. 402**

2. —— Bill of lading. See SALE OF GOODS.

3. —— *Charterparty—Demurrage—" Average " — Dispatch money — Calculation — " Charterers to have right to average days " allowed for loading and discharging."*

Judicial Precedent—Decision at first instance —Whether binding on other judge at first instance — Construction of commercial document.

ALMA SHIPPING CO. S.A. *v.* V. M. SALGAONCAR E IRMAOS LTDA. - - **Devlin J. 94**

4. —— *Nuisance—Discharge of oil—Public navigable river—Tanker stranded in estuary—Refloated by jettison of oil cargo—Damage to foreshore by oil—Action by owners of foreshore against shipowners — Claim based on trespass, nuisance and negligence—Negligence —Res ipsa loquitur—Onus of proof.*

Shipping — Collision — Negligence — Onus of proof. Negligence—Onus of proof—Res ipsa loquitur. Trespass—Indirect act. Nuisance. Practice—Pleadings—Omission—Due to other party's reticence.

SOUTHPORT CORPORATION *v.* ESSO PETROLEUM CO. LD. - - - - - **C.A. 182**

SOLICITOR — *Costs — Taxation — Agreement as to remuneration—Payment of lump sum in full settlement of solicitor's costs—Failure of solicitor to submit agreement to taxing officer for examination and allowance before receiving payment under agreement—No immunity from taxation—Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *ss.* 59, 60 (5) (6), 62.

In re SIMMONS & POLITZER - - **C.A. 296**

STARE DECISIS — Construction of Commercial Document. See SHIPPING.

STATUTE—Based on International Convention—Construction. See SHIPPING.

2. —— Construction. See AGRICULTURE.

STATUTORY DUTY—Breach. See FACTORY.

2. —— Whether cause of action for breach. See METROPOLIS.

TRADE DISPUTE—*Industrial Disputes Tribunal—Jurisdiction—Report by union on behalf of workmen—Reference of matter to tribunal by Minister as a " dispute "—Whether employer bound by national agreement as to increase of wages and holidays—Employers not members of federation—Distinction between " dispute " and " issue "—Industrial Disputes Order*, 1951 (*S.I.* 1951, *No.* 1376), *arts.* 1 *and* 2.

REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL. *Ex parte* TECHNALOY LD. - - **C.A. 46**

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WILL. See ADMINISTRATOR.